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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

Roger M. Donlon et al., *Petitioners*

v.

City of Oxnard et al., *Respondents*

On Petition For a Writ of Certiorari
To The Court of Appeal of
the State of California
Second Appellate District, Division Six

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a State, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, limit the voters at a special election held to authorize the issuance of $14,770,000 in tax-free bonds used to finance the private development and sale of private property to the owner of that property?

2. May a State, consistent with the United States Constitution's Contract Clause, endow the "*special tax*" imposed to pay the bonds with priority over previously recorded private liens?

3. May a State, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, conduct said elections, impose said "*special tax*" and procure a superior court judgment which validated them where the only notice provided to the previously recorded lienholders was by newspaper publication?

4. May a State, consistent with the Due Process and Equal Protection Clauses, bar the previously recorded lienholders from raising defenses based on the United States Constitution by a State statute of limitations triggered by the special elections without first providing notice sufficient to satisfy the requirements of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)?

5. May a State, consistent with the United States Constitution's Supremacy Clause, the First Amendment made applicable to the States by the Fourteenth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, provide its appellate courts with the unfettered power to ban written opinions from PUBLICATION and banish these unpublished opinions from the law?

LIST OF PARTIES

Petitioners are: Roger M. Donlon, an individual; Roger M. Donlon, trustee of the Roger M. Donlon Trust; Timothy R. Donlon, an individual; Timothy Roger Donlon, trustee for the benefit of Michael Joseph Donlon; Timothy Roger Donlon, trustee for the benefit of Brion Paul Donlon; Gregory H. Donlon, an individual; Brion Paul Donlon, an individual; Michael Joseph Donlon, an individual.

Respondents are: The City of Oxnard, a municipal corporation; Community Facilities District No. 88-1 of The City of Oxnard (Oxnard Town Center), a community facilities district.

The following additional parties named as defendants in this case may be affected by the decision of this Court: Natalie S. Witmer, trustee of Trust I; Natalie S. Witmer, trustee of Trust II; Ernest Milton Clark, Jr., trustee of the Ernest M. Clark, Sr. Trust; Ernest Milton Clark, Jr., trustee of the Mildred L. Clark Trust; Ernest Milton Clark, Jr., trustee of the Ethel Clark Lockwood Trust; Ernest Milton Clark, Jr., trustee of the Ernest M. Clark, Jr. Trust; Ernest Milton Clark, Jr., trustee of the Cynthia Clark Mitchel Trust; Ernest Milton Clark, Jr., trustee of the Father-Son Trust; Ernest Milton Clark, Jr., trustee of the Father-Daughter Trust; Ernest Milton Clark, Jr., trustee of the Ethel-Nephew Trust; Ernest Milton Clark, Jr., trustee of the Ethel-Niece Trust; Ernest Milton Clark, Jr., trustee of the Mildred-Nephew Trust; Ernest Milton Clark, Jr., trustee of the Mildred-Niece Trust.

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v.

City of Oxnard et al., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION SIX

PETITION FOR REVIEW

All parties with the surname Donlon (the Donlons) respectfully petition for a writ of certiorari to review, on United States Constitutional grounds only, the judgment of the Court of Appeal of the State of California Second Appellate District, Division Six (Appellate Court) entered in this case against the Donlons.

OPINIONS BELOW

The Appellate Court barred the written opinions it issued against the Donlons from publication and banished them from California law under California Rules of Court, Rules 976 and 977. App. A, *infra*, pp. 1a-24a. The trial court's written opinion against the Donlons was also unreported. App. C, *infra*, pp. 1c-15c.

JURISDICTION

The Appellate Court first issued its written opinion and judgment against the Donlons on March 31, 1998. App. A, *infra*, p. 1a. On April 29, 1998 it denied the Donlons' Petition for Rehearing; slightly modified its March 31, 1998 opinion and judgment (without change in the judgment) and denied the Donlons' Request for Publication, App. A, *infra*, pp. 23a, 24a. The Supreme Court of California denied review on June 17, 1998. App. B, *infra*, p. 1b. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Contract Clause embodied in Art. One, § 10 of the United States Constitution (emphasis added):

> **Section 10. No State shall** enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; **pass any** bill of attainder, ex post facto law, or **law impairing the obligation of contracts**, or grant any title of nobility.

The Supremacy Clause embodied in Art. VI, cl. 2 of the United States Constitution (emphasis added):

> **This Constitution, and the Laws of the United States** which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, **shall be**

> **the supreme law of the Land**; and **the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding**.

Amendment One to the United States Constitution made applicable to the States by the Fourteenth Amendment thereto (emphasis added):

> **Congress shall make no law** respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech, or of the press;** or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Due Process Clause and the Equal Protection Clause embodied in Section 1 of Amendment Fourteen to the United States Constitution (emphasis added):

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of** life, liberty, or **property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

STATEMENT OF THE CASE

This judicial foreclosure action was instituted by Respondents, City of Oxnard (City) and its alter ego, Community Facilities District No. 88-1 (District) under The Mello-Roos Community Facilities Act of 1982 (the Act).[1]

This judicial foreclosure action is the aftermath of a financing scheme the City designed and implemented for the express purpose of providing tax-free bond financing to a private party for the private improvement, development, and private (for profit) sale of other property (Commercial Land). CT 264, 282, 1817.[2]

The only property subject to this foreclosure action (Farm Land) is now, and was at all relevant times, separate and apart from the Commercial Land. CT 1816.

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[1]California Government Code § 53311, *et seq.*

[2]The record consists of the Appellate Court's written opinion issued in the Donlons' case on March 31, 1998 and the related Order Modifying said Opinion, Denying Rehearing, and DENYING PUBLICATION attached as Appendix A and herein sometimes collectively called *The Donlons' Unpublished Opinion*; the Order of the Supreme Court of California DENYING REVIEW attached as Appendix B; the trial court's judgment against the Donlons attached as Appendix C; the Appellate Court's written opinion issued November 22, 1994 in the Bank of A. Levy's case attached as Appendix D and herein sometimes called *The Bank's Unpublished Opinion*; a ten volume clerk's transcript cited as CT; a one volume supplemental transcript on appeal cited as SCT; a one volume reporter's transcript cited as RT.

The Farm Land received no benefit from the City's financing scheme. CT 264, 1182, 2482, 1863.

The financing scheme was effected without the Donlons' knowledge or consent. CT 1-3,805. When the financing scheme was implement the Donlons held, and still hold, a validly recorded interest in a validly recorded deed of trust which specifically and directly levied a lien of first priority against the Farm Land to secure payment of the unpaid purchase price of the Farm Land. App. A, *infra*, p. 1a; App. C, *infra*, pp. 11c-12c.

In a written opinion, which the Appellate Court directed was NOT TO BE PUBLISHED, the Appellate Court held that the so called "*special tax*" the City imposed on the Farm Land to pay the tax-free bonds had lien priority over the Donlons' previously recorded deed of trust. App. A, *infra*, pp. 3a, 22a.

Thus, a single division of a California court of appeal covertly and surreptitiously destroyed the Donlons' deed of trust and their financial security; corroded the United States Constitution and disregarded its fundamental principles to the point where the court itself functioned as a political power and a law unto itself.

A. The Facts

The facts are straightforward. In **1986** the Farm Land sold for $12,543,300 financed by an $11,694,587 promissory note secured by a validly recorded deed of trust (Note and Deed of Trust) with first lien priority specifically and directly encumbering the Farm Land. CT 2779; 2786. At all relevant times the Donlons held, and still hold, a validly recorded interest in the Note and Deed of Trust. CT 9-10.

In **1988** the City used the Act to issue $14,770,000 in tax-free bonds to exclusively finance the private development and private sale of the Commercial Land. App., A, *infra*, p. 4a; CT 1817. The Commercial Land was (and still is) separate and apart from the Farm Land. CT 1816.

In **1988** the City used the Act to impose a per square foot *special tax* on the Farm Land of **$32,471,000**. CT 1818. This so called *special tax* could only be used to pay the tax-free bonds and directly related expenses. Calif. Gov. Code § 53340.[3]

When the special tax was imposed on the Farm Land it exceeded the Farm Land's sales price by almost **20 MILLION DOLLARS**. It also exceeded the amount then required to discharge the Donlons' first trust deed lien against the Farm Land by almost **21 MILLION DOLLARS**. The Farm Land never received any benefit from the bond offering or the special tax imposed to pay the bonds. App. A, *infra*, pp. 2a, 7a.

The City could not have formed the District or authorized the tax-free bond issuance, or imposed the *special tax* without "*voter approval.*" § 53328.

The City maintains that it received the required "*voter approval*" in June, **1988** at a "*special election*" at which only the owner of the Commercial Land was allowed to vote. App. A, *infra*, p. 4; CT 264. At all relevant times said owner (Developer) was a California limited partnership. CT 264. The Developer was barred from the ballot box by the California Constitution. Calif.

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[3]Henceforth, unless otherwise noted, all references to code sections are to the California Government Code.

Const., Art. II, § 2; *Spier v. Baker*, (1898) 120 Cal. 370, 375.

At all relevant times the only relationship between the Developer and the Donlons was that of debtor (Developer) and creditor (the Donlons). App. A, *infra*, p. 2a.

In June, **1988** the City filed an "*in rem*" action in the Superior Court of Ventura County, California (Case No. 102218) (Validation Action) to "*validate*" the District, the special elections (at which only the Developer was allowed to vote), the bond offering, and the *special tax*. App. A., *infra*, p. 4a.

No person or entity was specifically named as a defendant in the Validation Action. CT 1750.

In the 183 pages the City filed in the Validation Action, the City never mentioned the Donlons' previously recorded Deed of Trust or the impact, if any, the *special tax* could have on it. CT 1750-1933. The City never even hinted that the *special tax* could, under any circumstances, have priority over previously recorded liens. CT 1750-1933. In fact, the City never mentioned the Donlons' Note or Deed of Trust in any fashion or at all. CT 1740-1933. The City specifically represented in the Validation Action that the only persons known to the City who might be interested in the outcome of the Validation Action were the Developer and a few governmental agencies. CT 1764. The City specifically declared in the Validation Action that the Fourteenth Amendment's guarantee "that a party with a significant interest in the outcome of an election was entitled to vote at that election" had been satisfied because "all persons with a significant interest in the outcome of the election

[namely only the Developer] were entitled to vote." CT 1834. The City specifically proclaimed in the Validation Action that the constitutional provisions which "forbid the taking of property without just compensation, and without due process of law" had been satisfied because "notice ... was mailed [only] to the sole Land Holder [Developer]." CT 1832, 1834.

Based on these representations (which could only be true where the Validation Action had no impact on the Donlons or their previously recorded interest in the Note and Deed of Trust), in August **1988**, the court granted the default judgment the City requested in the Validation Action which, among other things, "*validated*" the District, the special election, the bond offering, the special tax AND found that the special tax was not a property tax. CT 1926-1932.

The first time the Donlons ever saw a document which even remotely indicated that the *special tax* could have lien priority over their previously recorded Deed of Trust was when the complaint the City filed in this Foreclosure Action was served on them. CT 1-3,805.

B. The Proceedings Below

In April 1993, the City filed this action (Foreclosure Action) in the Superior Court of Ventura County, California (Case No. 125654) to collect the then delinquent portion of the Farm Land's *special tax* ($3,116,459.98, including penalties and interest) plus attorneys' fees and costs by judicial foreclosure. CT 17.

In a complete about face from the position the City had taken in the Validation Action;[4] in this Foreclosure Action the City alleged that the Donlons' previously recorded Deed of Trust was **subordinate** to the *special tax* and would be wiped out by this Foreclosure Action. CT 17-18.

The 35 affirmative defenses the Donlons specifically raised against the City's super-priority claim included the United States Constitution's Contract Clause, Due Process Clause, Equal Protection Clause and the final and binding effect of the default judgment entered in the Validation Action. CT 145-171.

The Donlons also cross-complained against the City and others for judicial foreclosure of their Deed of Trust. CT 178-209. This cross-complaint is still pending before the trial court. App. A, *infra*, pp. 5a-6a.

1. The Bank's Case

One of the named defendants in this Foreclosure Action was Bank of A. Levy (Bank). The Bank held a deed of trust which was recorded after the *special tax* was imposed AND at a time when the Bank had personal knowledge of the *special tax*. App. D, *infra*, p. 2d; CT 389. Despite these facts -- which the Bank never denied -- the Bank moved the trial court for summary judgment on the ground that the City had failed to record its lien; hence it had no lien to foreclose upon. App. D, *infra* p. 4d. The City countered the Bank's no-lien claim with the assertion that the Act provided it with a "continuing lien

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[4]That the Donlons' then recorded interest in the then recorded Deed of Trust could not be affected by the Validation Action.

against each parcel to be foreclosed upon" citing as its sole support § 53340. App. D, *infra*, p. 4d.

Faced with the City's unexplained failure to record its lien and a legislative act which failed to provide the City with an automatic lien as alleged; on February 2, 1994 the trial court entered summary judgment in favor of the Bank and against the City. App. D, *infra*, p. 4d.

On February 18, 1994, the Appellate Court issued the Writ of Mandate the City requested against the trial court. The Appellate Court justified its extraordinary relief which permitted "the City to bypass the Appellate process and pursue extraordinary relief" because:

> "'**the issues presented are of great public importance and must be resolved promptly' ... because they concern a matter of considerable statewide significance.**' [Citation Omitted]."

App. D, *infra*, p. 5d; emphasis added.

On November 22, 1994 the Appellate Court resolved those "issues of great public importance" in a written opinion which it DIRECTED WAS NOT TO BE PUBLISHED.[5]

In that opinion (*The Bank's Unpublished Opinion*) the Appellate Court sided with the trial court on the only issue presented to it of whether the Act provided the City

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[5]The unpublished opinion issued in the Bank's Case under 2d Civil No. BO81684 (*The Bank's Unpublished Opinion*) is set forth in full in App. D, *infra*.

with a lien despite its failure to record a lien. Without hesitation the Appellate Court held the Act failed to provide the City with an automatic lien as the City alleged. App. D, *infra*, p. 10d.

The reason it so held is now obvious, at least to the Donlons. The Appellate Court had bigger fish to fry than the Bank. Merely reversing the trial court on the no-lien issue would not have made the City's case against the Donlons. It had to do far, far more to rescue the City from the Donlons' prior lien; AND it did.

In *The Bank's Unpublished Opinion*, the Appellate Court abandoned the facts, the pleadings, and the arguments presented to the trial court and on appeal in favor of a brand new basis for recovery. The Appellate Court held the City's *special tax* was a property tax; hence the City did not need to record a lien to have a lien and its unrecorded lien had priority over all prior liens no matter when recorded. App. D., *infra*, p. 15d.

The reasons the City never presented this "winning property tax argument" to the trial court or on appeal were obvious then and now. To name but a few. Every California property tax must be imposed on the basis of value. Calif. Const., Art. XIII, § 1; *Watchtower Bible & Tract Soc. Inc. v. Los Angeles County* (1947) 30 Cal.2d 426, 428. Here the tax was imposed on the basis of square footage. App. D, *infra*, pp. 7d, 19d. A *special tax* cannot be a property tax. Calif. Const. Art. XIIIA § 4. The Act specifically decreed that a *special tax* imposed pursuant to it "shall not be construed to be on or based upon the ownership of real property", i.e., not a property tax. § 53325.3. The ordinances the City's legislative body adopted to impose the *special tax* specifically provided that the *special tax* was "not on or

based upon the ownership of real property", i.e., not a property tax. CT 1827, 1830-1872. The default judgment entered in the Validation Action specifically found that the special tax was not a property tax. CT 1930.

In *The Bank's Unpublished Opinion*, the law, the facts, logic and an oath of office failed to stop the Appellate Court from holding for the City. The Appellate Court simply rewrote § 53325.3 to its liking by deleting the words "any other reasonable basis." App. D, *infra*, p. 10d. It found, based solely on this deletion, that since the City's *special tax* was "apportioned on the basis of square footage" the portion of § 53325.3 which decreed that a special tax imposed under the Act "shall not be on or based upon the ownership of real property" had no application to the City's *special tax*; hence

> "[b]ecause the tax is not based on the benefit received or on the cost of making services available to each parcel, and because the tax is apportioned on the basis of square footage, this special tax is based on the ownership of real property in the District, including the instant parcel. Revenue and Taxation Code section 2187 applies here."

App. D, *infra*, p. 11d.

The bottom line result of the Appellate Court's blatant misconstruction of the law and the facts in *The Bank's Unpublished Opinion* is incredible. According to the Appellate Court, the City could "legally" impose a property tax under a legislative act which specifically prevented it from imposing a property tax; AND it could "legally" collect that property tax under the property tax

lien provisions of California's Revenue and Taxation Code; AND said lien provisions gave the City's *special tax* priority over all other liens despite the fact that said priority was limited to "[e]very tax declared in this chapter [Chapter 2 of the Rev. & Tax. Code] to be a lien on real property." App. A, *infra,* p. 21a.

Thus, out of whole cloth entirely of its own making, the Appellate Court elevated the *special tax* the City imposed to pay bonded indebtedness incurred for the private benefit of a private party for private personal gain to the sovereign status of a property tax. App. D, *infra*, p. 11d.

But that was not all. While the Bank's Case was pending before the Appellate Court, the very same court decided a minor squabble between the City of Camarillo and the County of Ventura as to which governmental agency was entitled to keep $48,000 in penalties collected for the delinquent payment of a *special tax* imposed (under the Act) by the City of Camarillo. In that opinion (*City of Camarillo v. County of Ventura*, (July 1994) 26 Cal.App.4th 1351 (*Camarillo Case*)), which the Appellate Court directed WAS TO BE PUBLISHED, the Appellate Court held that the penalties followed the tax; hence the County of Ventura had no claim to them because the tax was not a property tax. As its sole support, the Appellate Court cited § 53325.3 for the principle that a special tax imposed under the Act "shall not be construed to be on or based upon the ownership of real property." *Id.*, 1355.

Same time frame -- same court of appeal -- same panel -- same Act -- same statute -- same underlying issue -- yet in the PUBLISHED OPINION (*Camarillo Case*) the special tax WAS NOT a property tax and in the

UNPUBLISHED OPINION (*The Bank's Unpublished Opinion*) the special tax WAS a property tax.

The great significance of the *Camarillo Case* lay not in the fact that it had been properly decided; but in the fact that it had been published and therefore stated a rule of law which applied to everyone. Yet, without so much as a fleeting mention of the *Camarillo Case*, in *The Bank's Unpublished Opinion* the Appellate Court established a directly contrary rule of law which it initially applied only to the Bank's case.[6]

With what has come to be known as standard operating procedure, the Supreme Court of California denied the Bank's timely petition for review of *The Bank's Unpublished Opinion*. App. A, *infra*, p. 3a.

2. The Donlons' Case

On remand to the trial court for determination of the City's Foreclosure Action against the Donlons one thing was patently clear to the trial court. The law meant what the Appellate Court said it meant; and what it meant depended on whether the Appellate Court opinion was published or unpublished.

The trial court did not like the Appellate Court's view of the law one single bit. At the hearing at which the trial court denied the Donlons' defenses to the City's super-priority claim (based, among other things, on the

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[6]It is real life imitating art. In Alice in Wonderland the Queen's words meant what she said they meant. In the Appellate Court the law meant what it said the law meant regardless of what it had said the law meant just a few months earlier in a published opinion.

United States Constitution's Contract Clause, Due Process Clause and Equal Protection Clause) the usually unflappable trial court judge was moved to declare in open court that:

> "[t]his case is a little different for me because I think the Appellate Court is wrong. * * * This is really tough for me because I don't agree with anything the Appellate Court did, and I have my own views about this entire case. Nonetheless, I agree with the City there's only -- looks to me there's only one way to go in this case that the argument has got to be made with the Appellate Court."

RT 35:5-6; 40:24-41:1.

Thus, the trial court overruled the Donlons' defenses and entered summary judgment for the City despite its firm conviction that the Donlons were right and the Appellate Court was wrong.[7]

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[7]The summary judgment the trial court entered against the Donlons provided the City with lien priority over the Donlons' previously recorded Deed of Trust for every single dime of the delinquent *special tax* through May 1998, plus penalties and interest ($10,152,022), plus the City's attorneys' fees and costs through the same date ($911,865), and it promised the City that the judgment would be increased in both departments until the remaining portion of the *special tax* (around 27 million) plus attorneys' fees and costs were fully recovered. App. C, *infra*, pp. 8c-14c.

The written opinion the Appellate Court issued in the Donlons' case and directed WAS NOT TO BE PUBLISHED confirmed the trial court's worst suspicions.[8] Seethed with error and abuse, that opinion (*The Donlons' Unpublished Opinion*) simply fixed its judicial cross-hairs on the Donlons and fired.

With complete disdain for the fundamental rights guaranteed to the Donlons by the United States Constitution, the Appellate Court arrogantly decreed that:

> "the same principles of law which apply to Bank [which held a deed of trust recorded after the *special tax* was imposed with the Bank's full knowledge of that tax] apply to the Donlons [who held a deed of trust recorded two years before the *special tax* was imposed without the Donlons' knowledge or consent]"

App. A, *infra*, p. 18.

Ironically, the only "principles of law" the Appellate Court cited to uphold the City's super-priority claim were gleamed from special assessment cases. App., A, *infra*, pp. 18a-21a.

A special assessment is not a tax; never has been and never will be. A special assessment is a charge imposed on property for the special benefit specifically conferred

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[8]The unpublished opinion issued in the Donlons' case under 2d Civil No. B103714, B107180 (*The Donlons' Unpublished Opinion*) is set forth in full in App. A, *infra*.

on that property. *See, e.g., Knox v. City of Orland* (1992) 4 Cal.4th 132, at pp. 141-142.

Here, by the Appellate Court's own admission no benefit was conferred on the Farm Land. App. A, *infra*, p. 7a. Hence, there could not have been a special assessment and what the law said or did not say about special assessments was utterly irrelevant to the case the Donlons presented to the Appellate Court.

Not only did the Appellate Court blatantly apply the wrong law; it completely ignored the Donlons' most compelling arguments. It said nothing whatsoever about the Donlons' contention that the principles this Court announced in *Tulsa Professional Collection Services Inc., v. Pope*, 485 U.S. 478 (1988) prevented the Appellate Court from applying a statute of limitations to time bar the Donlons' defenses. It refused to address the question of whether the so called special tax was nothing more than a thinly disguised private mortgage which enabled the bondholders to make tax-free loans laundered through a specially created governmental agency (District) to a private borrower (Developer). It said nothing whatsoever on the question of whether California Code of Civil Procedure Section 870(b) finally and forever resolved the City's "super priority" claim against the City.[9] It shunted aside the Donlons' contention that the Act's

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[9]In pertinent part, California Code of Civil Procedure § 870(b) provided, then and now, with emphasis added that the default judgment entered in the Validation Action "**... shall**, not withstanding any other provision of the law, ... become and thereafter **be final and binding and conclusive as to all matters therein adjudicated or which at the time could have been adjudicated against the agency** [City] ...."

voting provisions were unconstitutional as written and as applied by finding these questions were time barred. App. A, *infra*, p. 12a. It ignored the Donlons' claim that providing the City's *special tax* with super priority violated the United States Constitution's Contract Clause, Due Process Clause and Equal Protection Clause. It was deadly silent on the Donlons' claim that the Fourteenth Amendment provided the Donlons with the constitutional right to have their case decided in a PUBLISHED OPINION in accordance with PUBLISHED law.

The Appellate Court's blatant avoidance of the hard facts the Donlons raised was just as specific. Ignored was the fact that the State and City's legislative bodies had both specifically decreed that the *special tax* was not a property tax. Ignored was the fact the default judgment the City obtained in the Validation Action held that the special tax was not a property tax. Ignored was the fact that a 32 acre parcel located in the heart of the Farm Land and leased as an integral part of it was excluded from the District and the obligation to pay a special tax to it. CT 1435. Ignored was the fact that the Bankruptcy Court had lifted its stay on the condition that the Appellate Court decide the Donlons' case by "published opinion." *See*, the Stipulation and Order of the Bankruptcy Court filed September 15, 1997 in BK No. ND 97-14383 RR at p. 6.

The Appellate Court's misstatement of the material facts was equally appalling. The Donlons never admitted "that the District was properly formed to authorize the levy of the instant special taxes on the authorized Mello-Roos bonds." App. A, *infra*, p. 12a. There was no "evidentiary stipulation and deposition testimony [to] establish that, as of January 1990, Roger M. Donlon knew about the existence and priority of the District's lien

for the Mello-Roos special taxes on the property, as did all the Donlon parties." *Id.*, p. 14a.

With mind numbing regularity, the Donlons could point this Court to the other flagrant misstatements of law and fact which riddle *The Donlons' Unpublished Opinion*. For what purpose? From what has been said, it should be painfully clear that the City's super-priority case should have shattered on the diamond hard precedents previously set by this Court. Instead, for political gain or whatever, the Appellate Court ignored, twisted and distorted the law beyond all recognition; turned its honorable office into a mouthpiece for the City; and buried its unconscionably illegal and immoral judgment from public view by decreeing that it was NOT TO BE PUBLISHED.

REASONS FOR GRANTING THIS PETITION

If history has taught us anything, it is that a judicial system either protects the citizens from tyranny or is one means by which tyranny is exercised over them.[10]

This case is but one of an ever growing legion of cases in which a State judiciary has turned its guns on those it was meant to protect.

In both *The Bank's Unpublished Opinion* and *The Donlons' Unpublished Opinion*, the Appellate Court went against the law so grossly, so palpably, that only corruption, malice and willful wrong can explain what it did.

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[10]Witness for example, the Spanish Inquisition, the English Star Chamber, and the French *lettre de cachet*.

The Appellate Court utterly disregarded the precedents set by this Court which governed the issues presented to it (i.,e., impairment of contracts,[11] voting,[12] notice,[13] tax,[14] and time bars[15]). Yet, the

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[11]*See, e.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *Van Hoffman v. City of Quincy*, 71 U.S. (4 Wall) 535 (1866); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827); each of which was cited to the Appellate Court on the "impairment issue."

[12]*See, e.g., Kramer v. Union Free School District No. 15 et al.*, 395 U.S. 621 (1969); *City of Phoenix v. Kolodziejski*, 399 U.S 204 (1970); *Hill v. Stone*, 421 U.S. 289 (1975); *Ball v. James*, 451 U.S. 355 (1981), each one of which was cited to the Appellate Court on the "voting issue."

[13]*See, e.g., Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); *Goss v. Lopez*, 419 U.S. 565 (1975); *Wolff v. McDonnell* 418 U.S. 539 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); each of which was cited to the Appellate Court on the "notice issue."

[14]*See, e.g., Hillsborough v. Cromwell*, 326 U.S. 620 (1946); *Concordia Fire Insurance Co. v. Illinois*, 292 U.S. 535 (1934); *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928); *Loan Association v. Topeka*, 87 U.S. 655 (1874); each of which was cited to the Appellate Court on the "tax issue."

Donlons cited each and every one of these decisions to the Appellate Court in their Opening Brief and at numerous times thereafter AND the Donlons furnished the Appellate Court with a full copy of these decisions. All to no avail. Further, on two separate occasions, the Appellate Court cited either a California Constitutional provision or a California Supreme Court case as authority for the very "principle of law" the Constitutional provision or California Supreme Court case had soundly rejected.[16]

No, the Donlons do not bring this Court a case where mere errors of law and judgment occurred. To the contrary, the Donlons are the sad bearers and victims of a case so vicious and evil that its "principles" are the very antithesis of those fundamentally guaranteed by the United States Constitution. A case where the City received a default judgment in the Validation Action based on the premise that the default judgment could not affect the Donlons' previously recorded Deed of Trust AND the

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[15]See, *Tulsa Professional Collection Services Inc. v. Pope* 485 U.S. 478 (1988) cited to the Appellate Court on the "time bar issue."

[16]*See,* App. A, *infra*, p. 13a wherein the Appellate Court cited *Horn v. County of Ventura* (1979) 24 Cal.3d 605, at p. 612 for the proposition that notice to the Donlons was not required and the so called "legislative action" was final and binding on them. *Horn, supra*, held precisely the opposite. *See,* also, App. A., *infra*, p. 17a, wherein the Appellate Court cited Art. XIIIA, § 4 of the Calif. Const. as the only support for its holding that the City had the power to impose a property tax. Art. XIIIA, § 4 of the Calif. Const. specifically provided, then and now, that its provisions shall not be used to impose a property tax.

Appellate Court subsequently held, without batting an eye, that the very special tax which the Validation Action "*validated*" (without notice to the Donlons) destroyed their previously recorded Deed of Trust. A case where, in a PUBLISHED OPINION (*Camarillo Case*), the Appellate Court held a special tax WAS NOT a property tax AND it twice subsequently held in UNPUBLISHED OPINIONS (the Bank's and the Donlons') that a special tax WAS a property tax. Only concepts like corruption, malice, graft, and willful wrong can explain such incredible inconsistencies.

At its core, the Donlons' case is about California Rules of Court, Rules 976 and 977. It begs this Court for a straightforward answer to a direct question. Do these court rules pass constitutional muster? In pertinent part the rules provide, with emphasis added by the rule itself (bolded) and here (underlined):

> Rule 976. Publication of appellate opinions.
>
> (a) **[Supreme Court]** All opinions of the Supreme Court shall be published in the Official Reports.
>
> (b) **[Standards for publication of opinions of other courts]** <u>No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion</u>:
>
> (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or

criticizes with reasons given, an existing rule;

(2) resolves or creates an apparent conflict in the law;

(3) involves a legal issue of continuing public interest; or

(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute or other written law.

(c) [Publication procedure]

(1) [Court of Appeal and appellate departments] An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b).

(2) [Supreme Court] An opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the Supreme Court to that effect.

Rule 977. Citation of opinions.

(a) [Unpublished opinions] An opinion of a Court of Appeal or an appellate

department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) [Exceptions] Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceedings.

To the Donlons one thing is deadly certain. They stand before this Court solely because of these court rules. But for them, the City would not have claimed "super priority" in the Foreclosure Action because the earlier position it took in the Validation Action would have been exposed; AND, the Appellate Court would not have ruled as it did because its judgment would have been severely criticized by both the financial community and the legal community, and it would have wrought chaos and confusion, or worse, on California's economy.

With deadly certainty Rule 976 works to secrete the most basic function of a court of appeal (deciding the case or controversy before it) from the other two co-equal branches of government and the people.

With the same deadly certainty Rule 977 works to turn what Chief Justice Marshall emphatically termed "a government of laws, not of men" into a government of men, not of laws. *Marbury v. Madison*, U.S. (1 Cranch) 127, 163 (1803).

In short, the rules provide for invidious discrimination among Americans practiced by the very courts which are charged with the responsibility of preventing discrimination.

Not only is it un-American to discriminate among Americans; it is unconstitutional.

Were a State to have the constitutional right to authorize its appellate courts to withhold opinions from public view and banish them from the law; then, indeed the United States Constitution would be a complete *felo d se* [act of suicide]. Mere wax in the hands of a State judiciary, which could twist and shape the United States Constitution into any form it pleases whenever it pleases.

The branches of the Constitutional tree which obviously prohibit such abuse are the Supremacy Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Perhaps less obvious is the fact that withholding opinions from public view chills speech and thwarts the public's right to truthful reports of judicial proceedings in violation of the First Amendment.

> "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.' [Citation]. A responsible press has always been

> regarded as the handmaiden of effective judicial administration, especially in the criminal field. The press does not simply publish information about trials but guards against miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for 'what transpires in the court room is public property.' [Citation]. The 'unqualified prohibitions laid down by the framers were intended to give liberty to the press * * * the broadest scope that could be countenanced in an orderly society.' [Citation]. And where there was 'no threat or menace to the integrity of the trial,' [Citation], we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism."

Sheppard v. Maxwell, 384 U.S. 333, 348 (1966).

In judicial proceedings the self-evident truths now are, and always have been, that secrecy in judicial proceedings leads the public to distrust the courts and question the competency and impartiality of the judges; that free and open proceedings contribute to a public understanding of and appreciation for the law; that the quality of the judicial system is elevated where it is subjected to the cleansing effects of exposure and public accountability. *See, e.g., In re Oliver*, 333 U.S. 257, 270-271 (1947).

In a nut shell:

> **"[s]unlight is said to be the best of disinfectants; electric light the most efficient policemen"**

J. Brandeis, Other People's Money 62 (1933); emphasis added.

In *Bridges v. California*, 314 U.S. 252, 260 (1941) Justice Black said

> "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."

Here this Court is not being asked to choose between these "cherished policies." Quite to the contrary, it is being asked to protect the citizens' constitutional right to a fair and meaningful trial by exposing the appellate process to public view.

Or, stated another way, it is being asked to refuse to sacrifice precious First and Fourteenth Amendment rights on the alter of judicial expediency, which in this case, like many others, is nothing more than a polite short-hand term for judicial incompetency, corruption, or graft.

Before this Court decides whether or not to accept this case for review there are a few additional things it might like to know. First, the Donlons vigorously asserted what they claimed to be their United States Constitutional right to have their case decided in a published opinion in accordance with published law at all stages of the proceedings. Second, the California Constitution mandates that "[d]ecisions of the Supreme

Court and courts of appeal that determine causes shall be in writing with reasons stated." Calif. Const. Art. 6, § 14. Third, in the past 30 years California has gone from a high of publishing 100% of its appellate court opinions to a low of publishing around 7% of them.[17]

When this Court ponders the cert worthiness of this Petition, it might like to keep in mind what Chief Justice Marshall said was the reason the Contract Clause found a home in the United States Constitution even before the Bill of Rights:

> "[t]he power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse and threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as

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[17] *See*, California Court Statistics Report, Annual Report Volume 1 1998, page 29 for the percentage of opinions published during the fiscal year 1996-1997.

> well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government."

Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 354-355 (1827).

Can it possibly be said that the mischief of an appellate court system which decides what is and is not the law on a case by case basis and hides its most offensive decisions from public view is any less great or alarming than the evils Chief Justice Marshall addressed; that such an appellate court system does not "sap the morals of the people and destroy the sanctity of private faith"?

CONCLUSION

The government of the United States is the result of a revolution in thought. It was founded on the principle that all persons have equal rights, and that government is responsible to and derives its powers from a free people. To the founding fathers, these ideas were not just a passing intellectual fad, but a recognition of something inherent in the nature of man himself. Equal and exact justice to all men, of whatever state or persuasion, religious or political, is one of the essential principles of our government.

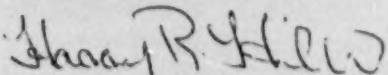
The noble promises and principles enshrined in the United States Constitution and the decisions of this Court which give life and meaning to them simply should not vanish like rainbows at sunset where they are most needed; in the trenches of the State courts where the vast majority of all cases are finally decided. No State

judiciary system should be allowed to ignore the United States Constitution and the decisions of this Court. No State judiciary system should be empowered to hide a written opinion deciding a case or controversy from public view. No State judiciary system should be allowed to decree that an appellate court opinion shall not be cited as authority in future cases.

Were this Court to deny this Petition it would bring further disgrace to a judicial system which is already the brunt of too many bad jokes; AND it would call the very reason and purpose for the United States Constitution and this Court into serious question.

For the reasons herein presented and many more this Petition should be granted.

Respectfully submitted,



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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

CITY OF OXNARD et al.	)	2nd Civil No. B103714,
	)	B107180
Plaintiffs, Cross-Defendants, and Respondents	)	(Super. Ct. No. CIV 1265654)
	)	(Ventura County)
	)	
v.	)	Court of Appeal-Second Dist.
	)	
ROGER M. DONLON et. al.	)	FILED
	)	Mar. 31, 1998
	)	
Defendants, Cross-Complainants, and Appellants	)	Joseph A. Lane, Clerk
	)	Deputy Clerk
	)	
	)	

The Donlons appeal from the second amended summary judgment for judicial foreclosure granted by the trial court to respondents, the City of Oxnard (City) and the Community Facilities District No. 88-1 (District).[1]

[1]Although the judgment concerns numerous other defendants, the Donlon defendants are the only appellants to the instant consolidated appeal. The Donlon defendants are Roger M. Donlon, an individual; Roger M. Donlon, trustee for the Roger M. Donlon Trust; Timothy R. Donlon, an individual; Timothy Roger Donlon, trustee for

Oxnard Town Center (OTC), a limited development partnership, owns certain real property within the District. OTC approved the levy of Mello-Roos special taxes on the property within the District to finance construction of infrastructure serving the area. (Gov. Code, §§ 3311 et seq. [Mello-Roos Community Facilities Act of 1982, as amended, hereafter, the Act].)[2]

The Donlons own a large promissory note secured by the first trust deed on certain parcels owned by OTC within the District. The Bank of A. Levy (the Bank) loaned money to OTC and obtained a second trust deed on one of the four parcels within the District as security for its loan. In 1991, OTC defaulted on the Mello-Roos special taxes it owes on the two parcels involved in the foreclosure proceedings at issue here.

The trial court severed the action into two parts. The first part concerned the City and District's complaint and certain portions of the cross-complaint. The instant, second part concerns issues raised by the Donlons pertaining to their first trust deed.

In 1994, the trial court granted summary judgment to the Bank in the first part of the action. We granted the petition for writ of mandate to compel the trial court to vacate its judgment and to enter judgment denying

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the benefit of Michael Joseph Donlon; Timothy Roger Donlon, trustee for the benefit of Brion Paul Donlon; Gregory H. Donlon, an individual; Brion Paul Donlon, an individual; and Michael Joseph Donlon, an individual.

[2]All statutory references are to the Government Code unless otherwise stated.

summary judgment to the Bank. (City of Oxnard v. Superior Court (Nov. 22, 1994) B081684 [nonpub. opn.].) We held that the special taxes levied by the district to finance real property improvements constitute a lien superior to the Bank's lien on its second trust deed. We ruled that the City may collect the delinquent special taxes by judicial foreclosure. Our Supreme Court denied the petition for review.

In the instant, second part of the case, the trial court determined that the special taxes levied constitute a lien superior to the Donlons' first trust deed. The trial court ruled that the City may judicially foreclose on the two parcels owned by OTC which are subject to the Donlons' first trust deed to secure payment of the delinquent special taxes.

The Donlons contend that the special taxes are not secured by the lien on real property provided by Revenue and Taxation Code section 2187, that any such lien has no priority over their deed of trust and that the published notice provided to establish the district was unconstitutional.

The Donlons argue that the trial court should have offset the taxes owed by the fair market value of another parcel which is not in default. They assert that the trial court should have permitted them to amend their cross-complaint to claim inverse condemnation and intentional interference with prospective economic advantage. We disagree with the Donlons and affirm.

We direct the trial court to adhere to the September 18, 1997 order of the bankruptcy court. The bankruptcy court's order does not modify or lift its automatic stay to permit immediate foreclosure, transfer

or conveyance of the property or any interest therein. Pursuant to that order, the District may petition the bankruptcy court to grant relief from its automatic stay to foreclose on the property.

FACTS

After the hearing, the council established the District, authorized the levy of special taxes to finance infrastructure in the District, declared the necessity to incur the debt and held an election to authorize issuance of up to $14,770.00 in bonds. (§§ 53322, 53325, 53346, 53351.)

There were no registered voters in the district. OTC, the landowner of record, elected to authorize issuance of the bonds to build the infrastructure pursuant to statute. (§§ 53327, 53325.7.) The City noticed and certified the election and recorded a notice of special tax authorization for the bonded indebtedness.

In August 1988, the trial court entered judgment on the action filed by the City on behalf of the District to validate establishing the District, assessing the special taxes and issuing the Mello-Roos bonds for the District. The validation judgment stated, inter alia, that the special taxes could be levied as set forth in the formation documents. No appeal ensued from that judgment.

The District issued the bonds and levied the special taxes on the four parcels comprising the District to pay for the authorized infrastructure. In 1988, parcel A was subdivided into nine lots. Two of those lots were combined to form parcel 1 which was sold to Bedford Properties. Parcel 1 contains about 5.5 acres improved by a fully leased six story commercial building. It also

includes an 11,944 square feet wedge of property (the wedge), consisting of a driveway apron and landscaping, which was originally in parcel D. The assessor's office reduced the size of parcel D after the transfer of the wedge to parcel A, and reduced the special taxes levied against parcel D accordingly. In 1995, the Donlons reconveyed their deed of trust encumbering the wedge. All of the special taxes assessed against parcel 1 of parcel A, including those for the wedge, have been paid.

In December 1988, the Bank approved a written loan request on parcel D, acknowledging that parcel D was in the District and was subject to the instant Mello-Roos special taxes. The bank obtained a second trust deed to parcel D as security for the loan. The Bank required that part of the loan proceeds be used to pay the special taxes. In 1991, OTC stopped paying the special taxes due on parcels C and D. The delinquent special taxes at issue here, levied against parcels C and D and owned by OTC, have not been paid since December 1991. The lien against the Donlons' interests in the first deed of trust is coincident with the lien for the delinquent special taxes, as reduced.

In April 1993, the City and District filed the instant complaint against OTC, the Donlons, the Bank and others seeking judicial foreclosure of the lien securing the delinquent special taxes on the subject land. (§§ 53356.1, 53356.2.) In August 1993, the Donlons, as holder of the first trust deed, filed the instant cross-complaint against OTC, the Bank, the City, the District and others.

The trial court ordered severance. It stated that the first action will be comprised of "(1) all issues raised by the City of Oxnard's, et al. complaint, specifically the priority and foreclosure issues raised therein; and (2) the

portions of the cross-complaint filed by the Donlon parties that assert claims against the City of Oxnard and [the District]. The issues raised by the Donlon parties' et al. cross-complaint against, without limitation, [certain other parties], including all those matters pertaining to the promissory note secured by the first trust deed on the Oxnard Town Center property, are ordered severed." (See *City of Oxnard v. Superior Court, supra,* B)81684 [nonpub. opn.].) Thus, all matters pertaining to the instant promissory note secured by the Donlons' first trust deed, including priority and foreclosure issues, were severed for separate trial.

On February 2, 1994, the trial court ordered summary judgment in favor of the Bank's claim of priority of its lien on its second trust deed. We granted an alternative writ to consider the summary judgment granted the Bank. The Donlons, among others, filed opposition arguing that the District has no lien against the real property upon which the City may collect the delinquent special taxes, as here.

On November 22, 1994, we granted the petition compelling the trial court to vacate its order and to enter judgment denying summary judgment to the Bank. We determined that the special taxes levied constitute a lien superior to that of the Bank, created by operation of Revenue and Taxation Code sections 2187 and 2192.1, upon which the City may collect the delinquent special taxes by judicial foreclosure against the parcels of real property within the District. (*City of Oxnard v. Superior Court, supra,* B081684 [nonpub. opn.].)

Revenue and Taxation Code section 2187 states, "Every tax on real property is a lien against the property assessed." (See also §§ 53326, subd. (c); 53340.5.)

Revenue and Taxation Code section 2192.1 states, in pertinent part, "Every tax declared in this chapter to be a lien on real property . . . [has] priority over all other liens on the property, regardless of the time of their creation. Any tax . . . described in the preceding sentence shall be given priority over . . . any . . . deed . . . with respect to which the subject real property may become charged or liable."

Because the special taxes were incurred to finance construction of long-term infrastructure and apportioned on the basis of square footage and acreage, and not on benefit received, the instant taxes are based on the ownership of real property in the District. (*See* § *53325.3, infra*) We denied the petition for rehearing, and our Supreme Court denied the petition for review.

In 1995, the Donlons twice moved for leave to amend their instant cross-complaint to add causes of action for inverse condemnation, interference with prospective economic advantage and declaratory relief. Both times, the trial court denied the motions.

The trial court granted the City and District's motion for summary judgment on the Donlons' cross-complaint on October 23, 1995. It ruled that respondents established their prima facie case for judicial foreclosure as a matter of law based on the undisputed facts showing that the District was validly formed, the special taxes validly levied, the delinquent special taxes and penalties are due and owing, and the City, acting as the legislative body for the District, properly authorized the instant judicial foreclosure action pursuant to the formation documents.

The court determined that the special taxes levied

are secured by a real property tax lien pursuant to Revenue and Taxation Code section 2187, and that the lien has priority over the first deed of trust owned by the Donlons, pursuant to Revenue and Taxation Code section 219.1.

The trial court ruled that respondents may foreclose the lien for special taxes, penalties, attorneys' fees and costs due prior to the foreclosure sale. Upon foreclosure, the Donlons were to be barred from all rights, claims, interests or equity of redemption in the property securing their deed of trust.

The trial court entered its initial judgment in the instant matter on May 10, 1996. It found that the lien of special taxes is prior to that of the instant first trust deed and determined the amount of special taxes, penalties and interest due. On June 24, 1996, the trial court entered its first amended judgment, finding that the special tax had priority over the interests of all defendants regarding the subject property and recalculated the amounts due. On October 11, 1996, the trial court entered its second amended judgment,including costs and attorneys' fees against the Donlons and others, both on the respondents' complaint and on the Donlons' cross-complaint.

On November 19, 1996, the trial court denied the Donlons' motion to credit the fair market value of parcel 1 against the delinquent special taxes owed against parcels C and D, and to marshal the assets of parcel 1 against the judgment for the delinquent taxes on parcel D.

The Donlons filed notices of appeal from the initial and the second amended judgments. We have consolidated the appeals under Case No. B103714.

On August 28, 1997, Gregory H. Donlon filed for bankruptcy under Title 11 of the United States Code to stay any transfer of property for failure to pay the instant delinquent special taxes pending the determination by this court of whether the judgment of the trial court is correct.

We recognized the automatic stay by our order of September 5, 1997. The parties requested that the bankruptcy court modify the automatic stay to permit this court to decide the instant appeal. The bankruptcy court approved the parties' stipulation. On September 18, 1997, the bankruptcy court issued an order terminating the stay to permit the instant appellate proceedings. The order terminated "the automatic stay as to the [instant] appeal as well as any subsequent appellate proceedings." The scope of relief granted by the bankruptcy court is limited. In particular, the order shall not "operate to or be construed as modifying or lifting the automatic stay in any manner . . . allowing the County of Ventura or District . . . to foreclose on the Property or to otherwise transfer or convey the Property or any interest therein in any fashion or form whatsoever."

We vacated the stay we had imposed on these proceedings so that the cause may proceed on appeal.

We independently review the second amended summary judgment granted respondents to determine whether there are any triable issues of fact and whether respondents are entitled to summary judgment as a matter of law. (*Ann M. v. Pacific Plaza Shopping Center* (1193) 6 Cal.4th, 666, 673-674.) Where, as here, the respondents met their burden to establish a prima facie case and that there is no viable defense to their action, the burden shifts to appellants to show that a triable issue of fact exists by providing additional, specific facts. (Code

Civ. Proc., § 437c, subd. (o) (1).) Appellants may not rely upon the mere allegations or denials in their pleadings, but shall set forth the specific facts showing that a triable issue of material fact exists. (*Ibid.*)

Preliminary Issues

"Bedford" wedge as indispensable party;

Parcel 1 to pay for delinquent taxes

The Donlons contend that the City's complaint should have been dismissed because the successor owners to the wedge are indispensable parties to the action. They argue that the wedge is part of parcel D; that they are entitled to full credit for payments made on Parcel A against the delinquent taxes on parcel D. (§§ 53340) We disagree. The wedge is part of parcel 1 of parcel A, not parcel D. The Donlons are not entitled to the credit they seek.

Section 53340 states that "[i]f any portion of a parcel is encumbered by a lien . . . the entirety of the parcel shall be encumbered by that lien . . . the entirety of the parcel shall be encumbered by that lien." Because no default in payment of special taxes existed against parcel A, thee was no basis to foreclose on the lien of special taxes thereon. The "Bedford" interests are not affected; they are not indispensable parties. The only unpaid special taxes at issue are those against parcels C and D. Section 53340 does not apply here.

In the alternative, the Donlons argue that we should apply the equitable doctrine of marshaling assets from parcel A to cure the default. (Gov. Code, §§ 2899, 3433; and see generally 11 Witkin, Summary of Cal. Law

(9th ed. 1990) Equity, § 175, p. 857.) The driveway apron and landscaping which comprise the wedge are of de minimis value. Aside from the wedge, parcel 1 contains about 5.5 acres improved by "a fully leased six story commercial building whose value is close to, if not exceeding the total amount of debt outstanding." It would be inequitable to credit payment of taxes on parcel 1 of parcel A against the amounts owing for parcels C and D. (Civ. Code, §§ 2899, 3433; *Harrington v Taylor* (1917) 176 Cal. 802, 807.)

Leave to Amend

The Donlons argue that the trial court erred when it denied leave to amend their cross-complaint to allege inverse condemnation and intentional interference with prospective economic advantage.

A trial court does not abuse its discretion when it denies leave if the proposed amendments do not state a cause of action or if they are subject to any defense stated. (5 Witkin, Cal. Procedure (45th ed. 1997) Pleading, § 1130, pp. 585-586.) Here, the proposed amendments are barred by statutes of limitation and they do not state viable causes of action. The claim for interference is also barred because the City's initiation of judicia foreclosure proceedings is privileged.

Inverse Condemnation

The instant claim for inverse condemnation constitutes an untimely district attack on the validity of the formation of the District and its authority to levy the assessment of the instant taxes without personal notice to the Donlons. (See generally *Hensler v. City of Glendale* (1994) 8 Cal.4th 1 [statute of limitations on inverse claim

based on city's adoption of an ordinance precluding development necessarily challenges the ordinance itself].)

Section 53341 states, in pertinent part, "Any action ... to attack, ... set aside, void, or annul the levy of a special tax . . . shall be commenced within 30 days after the special tax is approved by the voters." (See generally *Hensler v. City of Glendale, supra* 8 Cal.4th at p. 24; see esp. *New Davidson Brick Co. v. County of Riverside* (1990) 217 Cal.App.3d 1146, 1150-1151.) This short statute of limitations applies here to permit sound fiscal planning by local government entities and to preclude impairing the marketability of the authorized bonds. *(See Hensler, supra,* at pp. 27-28; *see esp. Allis-Chalmers v. City of Oxnard* (1980) 105 Cal. App.3d 876, 881, 883.)

A timely administrative mandamus proceeding, joined with a timely inverse claim, is the vehicle to alert the public agency that the validity of its action is being questioned. *(Hensler v. City of Glendale, supra,* 8 Cal.4th at pp.19, 26-28; *Patrick Media Group, Inc., v California Coastal Comm.* (1992) 9 Cal. App.4th 592, 608, 612-613; *California Coastal Com. v. Superior Court* (1989) 210 Cal. App.3d 1488, 1496-1497.) The Donlons did not timely attack the validity of the levy of the instant special taxes approved on June 14, 1988, and they failed to petition for writ of administrative mandamus. Furthermore, the Donlons admit that the District was properly formed to authorize the levy of the instant special taxes on the authorized Mello-Roos bonds.

The Donlons argue, however, that they neither knew of the underlying validation action nor that the lien of Mello-Roos special taxes would supersede their first

trust deed until respondents filed the foreclosure action in 1993. They assert that the statute of limitations does not begin to run until they had such notice.

Notice is not required and lack of knowledge of such underlying government action does not preclude the running of the applicable statute of limitation to bar inverse condemnation actions. (See generally *Patrick Media Group, Inc. v. California Coastal Com., supra,* 9 Cal. App.4th at pp. 616-617 [billboard company leasing space subject to short limitations statute regarding inverse claim despite its lack of knowledge of development permit obtained by the landowners, conditioned on termination of the billboard lease]; and see generally *Horn v. County of Ventura* (1979) 24 Cal.3d 606, 612; *Zipperer v. City of Fort Meyers* (11th Cir. 1995) 41 F.3d 619, 624, citing *Federal Deposit Ins. Corp. v. City of New Iberia* (5th Cir. 1991) 921 F.2d 610 as distinguishing and narrowing the application of *Mennonite Board of Missions v. Adams* (1983) 462 U.S. 791 [77 L.Ed.2d 180], cited by the Donlons here.)

The legislative decision to levy special assessments and to provide priority of assessments over previous mortgage liens does not affect mortgages as does a tax sale; it does not deprive such lienholders, as the Donlons, of due process. The creation of the instant special district constitutes such a legislative act grounded in the taxing power of the government. *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 683-684.) Judicial review of these legislative acts is now untimely. *Horn v. County of Ventura, supra,* 24, Cal.3d at p. 612.)

In an analogous situation, the Fifth Circuit explained that "[t]he mortgagee's interest in the property

is derivative from that of the owner. To allow the mortgage to assert an unconstitutional taking because of a special assessment sought by the landowner would allow the mortgagee potentially to receive whatever benefit did result from the improvements without having to pay for them." (*Federal Deposit Ins. Corp. v. City of New Iberia, supra,* 921 F.2d at pp. 615-616.) Moreover, the court had that creating tax liens and levying special assessments to pay for construction of public infrastructure does not constitute a taking. (*Id.*, at p. 611.)

The Donlons would be barred by the 30-day statute applicable here under the usual rule that statutes of limitation commence running when affected persons become aware of facts which would make a reasonably prudent person suspicious of possible violation of their rights. (*Sanchez v. Sough Hoover Hospital* (1976) 18 Cal.3d 93, 101.) The Donlons had inquiry notice and actual knowledge of the District's lien, and its priority, in January 1990. (*Miller v. Bechtel* (1983) 33 Cal.3d 868, 875.) The Donlons did not seek to amend its cross-complaint until March 1995.

An evidentiary stipulation and deposition testimony establish that, as of January 1990, Roger M. Donlon knew about the existence and priority of the District's lien for the Mello-Roos special taxes on the property, as did all the Donlon parties. As of no later than November 1991, the Donlons knew that failure to pay the special taxes would seriously jeopardize their interest in the property.

Indeed, by early 1987, the Donlons' previous counsel, Thomas Ferguson, had been advising Donlon about exchanging other property for an interest in the

instant note secured by the instant trust deed. Ferguson provided Donlon with the documents regarding the exchange which Donlon reviewed. These include the note, the instant trust deed and the development agreement.

Ferguson was involved with the formation of the District and he knew that OTC petitioned the City to form the District and to obtain the Mello-Roos bond financing for its infrastructure. He received mailed notice of the City's public hearing to form the District and issue the bonds, and he attended the hearing. (§§53322, 53346.) In June 1988, he knew that the special taxes would be levied and that a lien would be placed on the property to secure payment of the Mello-Roos bonds. In December 1991, he knew that the special tax payments had become delinquent and that the City would foreclose on the lien under the Act.

As of December 1988, the Bank had approved a written development loan requested by OTC acknowledging that the instant property was in the District and subject to the Mello-Roos special taxes at issue here. The Bank required that part of the loan proceeds be used to pay the 1988/1989 special taxes for the District. The Bank obtained a second trust deed on the subject property for the $1.6 million loan. The Donlons held and assigned the first trust deed to the property to OTC, in which they were limited partners.

Lastly, there is no taking here because the lien of Mello-Roos special taxes on the real property supersedes the Donlon's trust deed as a matter of law. (See generally *Federal Deposit Ins. Corp. v. City of New Iberia, supra,* 921 F.2d at p. 611.)

Interference with Prospective Economic Advantage

The statute of limitations for intentional interference with prospective economic advantage is two years. (Code Civ. Proc., §§ 339, subd. (1); *Augusta v. United Service Automobile Assn.* (1993) 13 Cal.App.4th 4, 10.) No later than January 1990, the Donlons knew that Mello-Roos special taxes had been imposed on the instant property in the District and that the lien securing the taxes might have priority over their deed of trust. The statute of limitations bars the cause of action for interference.

Furthermore, the actions taken by respondents in authorizing judicial foreclosure in January 1992 are subject to the immunities provided by the Tort Claims Act and the litigation privilege in Civil Code section 47. (See §§ 815.2, subd. (b); 815.3, subd. (a); 818.2; 820.4; 821.6; and see generally *Wilton v. Mountain Wood Homeowners Assn.* (1003) 18 Cal.App.4th 565, 569-570.)

Constitutionality of Voting Provisions of the Act

The Donlons argue that the provisions of the Act, permitting OTC to authorize the District to issue the instant bonds and to levy the special taxes, violate the Fourteenth Amendment to the United States Constitution and article II, section 2 of the California Constitution (citing *Phoenix v. Kolodziejski* (1970) 399 U.S. 204 [26 L.Ed.2d 523], which concerns general obligation bonds). §§ 53327; 53325.7.)

The judgment in the validation action is binding on the Donlons and bars them from "the institution . . . of any action or proceeding raising any issue as to which the [validation] judgment is binding and conclusive." (Code

Civ. Proc., § 870.) The Donlons may not raise the various constitutional issues presented here. Moreover, their suffrage rights have not been abridged.

Municipal corporations possess the power to tax as provided by the Constitution or by statutes. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 247-248; *Dawson v. Town of Los Altos Hills, supra,* 16 Cal.3d at pp. 683-684.) Article XIIIA, section 4 of the California Constitution and the Act authorize city councils to impose special taxes to finance public infrastructure of a special district pursuant to two-thirds vote of the applicable electorate. (§§ 53311.5; 53317, subds. (b), (g) & (h); 53328, subd. (a); 53358.)

Only the owners of land located within the proposed District are qualified to vote to form the District, to issue the bonds and to levy the special taxes for the District. (§§ 53318; 53326, subds. (b), (c).) Pursuant to the vote of the owners of OTC, the City adopted a resolution to incur the bonded indebtedness approved, to record notice of the special tax authorization, to obtain judicial validation of the proceedings to establish the District, to access the special taxes and to issue the bonds. (*Sts. & Hy. Code,* § 3114.5; §§ 53318, 53340.)

The Merits

The Donlons opine that the instant special taxes are not taxes, that the City had no authority to impose them, and that the taxes are not secured by a lien on the real property which takes priority over its deed of trust.

Our review of the "peculiarly legislative process"

of the taxing power of the sovereign is quite narrow. (See *Dawson v. Town of Los Altos Hills, supra,* 16 Cal.3d at pp. 683-684.) Section 53312.5 states that "[t]he local agency may take any actions or make any determinations which it determines are necessary or convenient to carry out the purposes of this chapter and which are not otherwise prohibited by law." Section 53315 provides that "[t]his chapter shall be liberally construed . . . to effectuate its purposes."

In our previous unpublished opinion concerning the Bank's second trust deed, we considered and rejected the same arguments made here.

Strictly speaking, our 1994 opinion as to the Bank is not law of the case, as respondents suggest, because it only concerned the Bank and not the Donlons. (See generally *People v. Stanley* (1995) 10 Cal.4th 764, 786.) This is so even though the Donlons appeared as real parties in interest and participated in the prior writ proceeding, arguing the same issues. The issues concerning the Donlons' promissory note, at least as they relate to other parties, were tried separately. Nonetheless, the same principles of law which apply to the Bank apply to the Donlons. We briefly discuss them.

"*A lien is created*: [¶] 1. By contract . . . or, [¶] 2. By operation of law." (Civ. Code, § 2881.) Revenue and Taxation Code section 2187 provides that "[e]very tax on real property is a lien against the property assessed." Revenue and Taxation Code section 104 broadly defines real property to include: "(a) The possession of, claim to, ownership of, or right to the possession of land. ¶ . . . (c) Improvements."

The Donlons again have misconstrued section

53325.3 to assert that the instant special taxes are not based on the ownership of real property. When enacted in 1984, section 53325.3 stated, "A tax imposed pursuant to this chapter is a special tax and not a special assessment, and there is no requirement that the tax be apportioned on the basis of benefit to any property. However, a special tax levied pursuant to this chapter may be on or based on benefit received by parcels of real property, the cost of making facilities or authorized services available to each parcel, or other reasonable basis as determined by the legislative body. A special tax apportioned on any of these bases shall not be construed to be on or based upon the ownership of real property." In 1996, the Legislature deleted the last sentence of section 53325.3. (Stats. 1996, Ch. 1161, No. 9 Deering's Adv. Legis. Service, § 2, pp 7596-7597.)

On its face, section 53325.3 explains that Mello-Roos special taxes are not special assessments charged to provide particular benefits to specific parcels of real property. (*See Knox v. City of Orland* (1992) 4 Cal.4th 132, 142.) Section 53325.3 provides that Mello-Roos special taxes need not be apportioned on the basis of particular benefit to any specific parcel in the District. Indeed, the instant taxes were not so apportioned.

The District incurred the debt to finance construction of real property improvements to fulfill the public demand for services in the area likely to result from OTC's development. The instant special taxes were apportioned based on the square footage and acreage of the developed and undeveloped parcels of real property in the District respectively, not on benefit received or on the cost of making facilities or services available to each parcel.

The special tax is based on the ownership of real property in the District, including the instant parcels. The Act requires the county auditor to report the amount of special taxes collected ". . . and from which property those revenues were collected, identifying any properties which are delinquent . . ." (§ 53340.5.) Revenue and Taxation Code section 2187 applies here providing the District with a lien against the real property assessed therein to ensure the payment of the levy of the instant special taxes.

The Donlons opine that the instant lien for the special taxes does not have priority over its mortgage. They are incorrect. It is well-established that there is ". . . no constitutional objection to a legislative provision making the county's lien superior to pre-existing mortgages . . ." (*Guinn v. McReynolds* (1918) 177 Cal. 230, 232, citing *Provident Institution for Savings v. Mayor and Aldermen of Jersey City* (1885) 113 U.S. 506 [28 L.Ed. 1102].)

Revenue and Taxation Code section 2192.1 specifically states that "[e]very tax declared in this chapter to be a lien on real property . . . [has] priority over all other liens on the property, regardless of the time of their creation. Any tax . . . described in the preceding sentence shall be given priority over . . . any . . . deed . . . with respect to which the subject real property may become charged or liable."

The Donlons argue that because the District chose to pursue judicial foreclosure, instead of a state tax sale with a statutory right of redemption within five years, it may not rely on the super-priority generally accorded tax liens on real property. We disagree.

The Donlons misplace their reliance on section 53340. Section 53340 provides that special taxes shall be collected and be subject to the same procedure, sale and lien priority in case of delinquency as is provided for ad valorem taxes, "*unless another procedure has been authorized in the resolution of formation establishing the district* . . ." When the District was created, the provisions of section 53340 were discretionary. The resolution forming the district expressly authorized another procedure for collection of delinquent special taxes, the judicial foreclosure sought here, as allowed by statute.

As of 1986, as an alternative and cumulative remedy for the collection of delinquent taxes, section 53356.1 provided that ". . . if any amount levied as a special tax . . . [is] not paid when due, the legislative body may . . . order that the same be collected by an action brought in the superior court to foreclose any lien therefor." (Stats. 1986, ch. 1102, No. 6 Deering's Adv. Legis. Service, p. 161.)

The Donlons cite *T.M. Cobb Co. v. County of Los Angeles* (1976) 16 Cal.3d 606, 619, for the proposition that where a tax collector has the choice between collecting a delinquent tax under a statute which expressly provides for super-priority and on which does not so provide, and chooses the one which does not so provide, super-priority will not be implied. *(Id.*, at pp. 628-630.)

Cobb is inapposite here. From the inception of the District, the tax collector did not have the choice to proceed by state tax sale. The resolution of formation expressly requires that collection of delinquent taxes be accomplished by judicial foreclosure within 150 days after notice of delinquency is provided, pursuant to section

53356.1, subdivision (b), to protect investors in the bonds. In any case, as a cumulative remedy, the legislative body may commence judicial foreclosure on any delinquent Mello-Roos special taxes levied to pay the dept within four years of the due date of the last principal installment for special taxes. (§§ 53356.1, subd. (a).)

The instant judicial foreclosure proceedings comport with both the intent and letter of the Act proceedings comport with both the intent and letter of the Act providing for swift judicial foreclosure proceedings without a lengthy redemption period where the formation resolution creating the District provides for it, as here.

The summary judgment is affirmed. We direct the trial court to adhere to the September 18, 1997 order of the bankruptcy court which precludes respondents from foreclosing, transferring or conveying the property or any interest therein subject to further relief which may be granted by the bankruptcy court upon request therefor. Costs are awarded to respondents.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, J., Acting P.J.

YEGAN, J.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

CITY OF OXNARD et al.	) 2nd Civil No. B103714,
	) B107180
Plaintiffs, Cross-Defendants, and Respondents	) (Super. Ct. No. CIV 1265654)
	) (Ventura County)
	)
v.	) ORDER MODIFYING
	) OPINION, DENYING
ROGER M. DONLON et. al.	) REHEARING AND
	) PUBLICATION
	)
Defendants, Cross-Complainants, and Appellants	) Court of Appeal-Second
	) Dist.
	) FILED
	) Apr. 29, 1998
	) Joseph A. Lane, Clerk
	) Deputy Clerk

THE COURT:

It is ordered that the opinion filed herein on March 31, 1998, be modified in the following particular:

On page 15, delete the last sentence of the second full paragraph which reads, "The Donlons held and assigned the first trust deed to the property to OTC, in which they were limited partners."

Appellants' petition for rehearing is denied.

Appellants' request for publication is denied.

There is no change in the judgment.

Second Appellate District, Division Six,
No. B103714/B107180
SO70135

IN THE SUPREME COURT OF CALIFORNIA

CITY OF OXNARD Et Al., Respondents

Supreme Court
FILED
JUN 17 1988
Robert Wandruff Clerk

v.

Deputy

ROGER M. DONLON Et Al., Appellants

Appellants' petition for review DENIED.

GEORGE

Chief Justice

Supreme Court of California Order Denying Review
App. B, Page 1b

VENTURA COUNTY
SUPERIOR AND MUNICIPAL COURTS
FILED
OCTOBER 11 1996
SHIELA GONZALEZ, SUPERIOR AND
MUNICIPAL COURTS EXECUTIVE
OFFICER AND CLERK

By_____, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY VENTURA

THE CITY OF OXNARD, a municipal corporation COMMUNITY FACILITIES DISTRICT NO. 88-1 OF THE CITY OF OXNARD (OXNARD TOWN CENTER), a community facilities district, Plaintiffs, vs. OXNARD TOWN CENTER, a California limited partnership; FIRST OXNARD GROUP, a California general partnership; RIVER EDGE	CASE NO. 125654 SECOND AMENDED JUDGMENT OF FORECLOSURE AND ORDER OF SALE

PROPERTIES, INC., a California corporation; WY-OX INVESTMENTS, LTD., a California limited partnership; RAY-OX INVESTMENTS, LTD., a California limited partnership; STAN-OX INVESTMENTS, LTD., a California limited partnership; OXNARD ASSOCIATES, a California limited partnership; WY-OX CORP., a Delaware corporation; RAY-OX CORP., a Delaware corporation; STAN-OX CORP., a New York corporation; RIVER INVESTMENT CORP., a New Jersey corporation; NATALIE S. WITMER, Trustee of Trust I; NATALIE S. WITMER, Trustee of Trust II; ERNEST MILTON CLARK, JR., Trustee of the Ernest M. Clark, Sr. Trust; Trustee of the Ernest M. Clark, Sr. Trust; ERNEST MILTON CLARK, JR., Trustee of the Mildred L. Clark Trust; ERNEST MILTON CLARK, JR., Trustee of

the Ethel Clark Lockwood)
Trust; ERNEST MILTON)
CLARK, JR., Trustee of)
the Ernest M. Clark, Jr.)
Trust; ERNEST MILTON)
CLARK, JR., Trustee)
of the Cynthia Clark)
Mitchell Trust, ERNEST)
MILTON CLARK, JR.,Trustee)
of the Father-Son Trust;)
ERNEST MILTON CLARK,)
JR., Trustee of the)
Father-Daughter Trust;)
ERNEST MILTON CLARK,)
JR., Trustee of the)
Ethel-Nephew Trust;)
ERNEST MILTON CLARK,)
JR., Trustee of the)
Ethel- Niece Trust;)
ERNEST MILTON CLARK,)
JR., Trustee of the)
Mildred-Nephew Trust;)
ERNEST MILTON CLARK,)
JR., Trustee of the)
Mildred-Niece Trust;)
ROGER M. DONLON,)
an individual; ROGER M.)
DONLON, Trustee of the)
Roger M. Donlon Trust;)
TIMOTHY R. DONLON, an)
individual; TIMOTHY ROGER)
DONLON, Trustee for the)
Benefit of Michael Joseph)
Donlon; TIMOTHY ROGER)
DONLON, Trustee for the)
benefit of BRION PAUL)

DONLON; GREGORY H. DONLON, an individual; BRION PAUL DONLON, an individual; MICHAEL JOSEPH DONLON, an individual, BANK OF A. LEVY, a California corporation; DREXEL BURNHAM LAMBERT INCORPORATED, a Delaware corporation; EXECUTIVE LIFE INSURANCE COMPANY, a California corporation; NEW STREET CAPITAL CORPORATION, a Delaware corporation; EXECUTIVE REALTY CORP., a California corporation; and DOES 1 through 100,inclusive.

Defendants.

AND RELATED CROSS-COMPLAINT

A. This Court, having on June 18, 1996, granted the Motion of plaintiffs The City Of Oxnard, a municipal corporation (the "City"), and Community Facilities District No. 88-1 of the City of Oxnard (Oxnard Town Center), a community facilities district (the "District") (collectively, "Plaintiffs") for Judgment on the Pleadings against defendants Oxnard Town Center, a California limited partnership; First Oxnard Group, a California

general partnership; River Edge Properties, Inc., a California corporation; Wy-Ox Investments, Ltd., a California limited partnership; Stan-Ox Investments, Ltd., a California limited partnership; Oxnard Associates, a California limited partnership; Wy-Ox Corp., a Delaware corporation; Stan-ox Corp., a New York corporation; and River Investment Corp., a New Jersey corporation (collectively, the "Oxnard Town Center Defendants.), and having ordered entry of judgment on Plaintiffs' Complaint pursuant to California Code of Civil Procedure Section 438 against the Oxnard Town Center Defendants as requested in that Motion; and

B. This Court, having on October 23, 1995 granted the Motion for Summary Judgment by Plaintiffs and Cross-Defendants the City and the District against Defendants and Cross-Complainants Natalie S. Witmer, Trustee of Trust I; Natalie S. Witmer, Trustee of Trust II; Ernest Milton Clark, Jr., Trustee of the Ernest M. Clark, Sr. Trust; Ernest Milton Clark, Jr., Trustee of the Mildred L. Clark Trust; Ernest Milton Clark, Jr., Trustee of the Ethel Clark Lockwood Trust; Ernest Milton Clark, Jr., Trustee of the Ernest M. Clark, Jr. Trust; Ernest Milton Clark, Jr., Trustee of the Cynthia Clark Mitchel Trust; Ernest Milton Clark, Jr., Trustee of the Father-Son Trust; Ernest Milton Clark, Jr., Trustee of the Father-Daughter Trust; Ernest Milton Clark, Jr., Trustee of the Ethel-Nephew Trust; Ernest Milton Clark, Jr., Trustee of the Ethel-Niece Trust; Ernest Milton Clark, Jr., Trustee of the Mildred-Nephew Trust; Ernest Milton Clark, Jr., Trustee of the Mildred-Niece Trust; Roger M. Donlon, an individual; Roger M. Donlon, Trustee of the Roger M. Donlon Trust dated November 9, 1982; Timothy R. Donlon, an individual; Timothy Roger Donlon, Trustee for the Benefit of Michael Joseph Donlon; Timothy Roger Donlon, Trustee for the Benefit

of Brion Paul Donlon; Gregory H. Donlon, an individual; Brion Paul Donlon, an individual; and Michael Joseph Donlon, an individual (collectively referred to herein as the "Clark/Witmer/Donlon Defendants" and/or the "Clark/Witmer/Donlon Cross-Complainants") and having ordered entry of judgment in favor of the City and the District on both the Complaint and the Cross-Complaint pursuant to California Code of Civil Procedure Section 437c as requested in said Motion, and,

C. This Court having approved the Stipulation for Entry of Declaratory Relief Judgment entered into between the City and the District and Drexel Burnham Lambert Incorporated, a Delaware corporation, and New Street Capital Corporation, a Delaware corporation, and having ordered entry of judgment in favor of the City and the District on Plaintiffs' Complaint against Drexel Burnham Lambert Incorporated and New Street Capital Corporation; and

D. This court having approved the Stipulation for Entry of Declaratory Relief Judgment entered into between the City and the District and Executive Life Insurance Company, a California corporation, and Executive Realty Corporation, a California corporation, and having ordered entry of judgment in favor of the City and the District on Plaintiffs' Complaint against Executive Life Insurance Company and Executive Realty Corporation; and

E. This Court having approved the Stipulated Declaratory Relief Judgment entered into between the City and the District and the Bank of A. Levy, a California corporation, and having ordered entry of judgment in favor of the City and the District on Plaintiffs' Complaint against the Bank of A. Levy; and

Good cause having been shown therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Judgment is entered in favor of Plaintiffs the City and the District against the Oxnard Town Center Defendants on Plaintiffs' Complaint for Judicial Foreclosure of Special Tax Liens.

2. Judgment is entered in favor of Plaintiffs the City and the District against the Clark/Witmer/Donlon Defendants on Plaintiffs' Complaint for Judicial Foreclosure of Special Tax Liens.

3. Judgment is entered in favor of Cross-Defendants the City and the District against the Clark/Witmer/Donlon Cross-Complainants on their cross-Complaint for Judicial Foreclosure.

4. Judgment is entered in favor of Plaintiffs the City and the District against Drexel Burnham Lambert Incorporated and New Street Capital Corporation on Plaintiffs' Complaint for Judicial Foreclosure of Special Tax Liens.

5. Judgment is entered in favor of Plaintiffs the City and the District against Executive Life Insurance Company and Executive Realty Corporation on Plaintiffs' Complaint for Judicial Foreclosure of Special Tax Liens.

6. Judgment is entered in favor of Plaintiffs the City and the District against the Bank of A. Levy on Plaintiffs' Complaint for Judicial Foreclosure of Special Tax Liens.

7. Plaintiffs are entitled to foreclose the District's real

property tax liens arising under California Revenue and Taxation Code Section 2187 (the "District's Liens") on real property in the District owned by Oxnard Town Center, a California limited partnership, more particularly described in paragraph 23 below (the "Properties"), as security for the payment of delinquent special taxes levied on the Properties for fiscal years 1991/1992, 1992/1993, 1993/1994, 1994/1995, and 1995/1996 pursuant to the Mello-Roos Community Facilities Act as amended, California Government Code Sections 53311 et. seq. (the Act"), plus interest, penalties, attorneys' fees, costs, expenses and other charges now due or to become due prior to the foreclosure sale or sales, as follows:

a. As of August 31, 1996, special taxes, interest and penalties levied against Parcel 1 described in paragraph 23 below were delinquent in the total amount of $3,942,515.98, plus attorneys, fees, costs, and other charges. These totals are comprised of the following:

(1) Delinquent special taxes levied against Parcel 1 for fiscal year 1991/1992 in the amount of $332,509.46, plus a 10% penalty in the amount of $33,250.94, plus interest at the rate of 1.5% per month starting on July 1, 1992 in the amount of $249,382.10.

(2) Delinquent special taxes levied against Parcel 1 for fiscal year 1992/1993 in the amount of $594.173.84, plus a 10% penalty in the amount of $59,417.38, plus interest at the rate of 1.5% per month starting on July 1, 1993 in the amount of $338,679.08.

(3) Delinquent special taxes levied against Parcel 1 for fiscal year 1993/1994 in the amount of $594,173.84, plus a 10% penalty in the amount of $59,417.38, plus interest at the rate of 1.5% per month starting on July 1,

1994 in the amount of $231,727.80.

(4) Delinquent special taxes levied against Parcel 1 for fiscal year 1994/1995 in the amount of $594,173.84, plus a 10% penalty in the amount of $59,417.38. plus interest at the rate of 1.5% per month starting on July 1, 1995 in the amount of $124,776.50.

(5) Delinquent special taxes levied against Parcel 1 for fiscal year 1995/1996 in the amount of $594,173.84, plus a 10% penalty in the amount of $59,417.38, plus interest at the rate of 1.5% per month starting on July 1, 1996 in the amount of $17,825.22.

b. As of August 31, 1996, special taxes, interest and penalties levied against Parcel 2 described in paragraph 23 below were delinquent in the total amount of $7,542,983.78, together with attorneys' fees, costs, and other charges. These totals are comprised of the following:

(1) Delinquent special taxes levied against Parcel 2 for fiscal year 1991/1992 in the amount of $637,512.72, plus a 10% penalty in the amount of $63.751-28, plus interest at the rate of 1.5% per month starting on July 1, 1992 in the amount of $478,134.54.

(2) Delinquent special taxes levied against Parcel 2 for fiscal year 1992/1993 in the amount of $1,136,354.50, plus a 10% penalty in the amount of $113,635.46, plus interest at the rate of 1.5% per month starting on July 1, 1993 in the amount of $647,722.06.

(3) Delinquent special taxes levied against Parcel 2 for fiscal year 1993/1994 in the amount of $1,136,354.50, plus a 10% penalty in the amount of $113,635.46, plus

interest at the rate of 1.5% per month starting on July 1, 1994 in the amount of $443,178.26.

(4) Delinquent special taxes levied against Parcel 2 for fiscal year 1994/1995 in the amount of $1,136,354.50, plus a 10% penalty in the amount of $113,635.46, plus interest at the rate of 1.5% per month starting on July 1, 1995 in the amount of $238,634.44.

(5) Delinquent special taxes levied against Parcel 2 for fiscal year 1995/1996 in the amount of $1,136,354.50, plus a 10% penalty in the amount of $113,635.46, plus interest at the rate of 1.5% per month starting on July 1, 1996 in the amount of $34,090.64.

c. Pursuant to Section 53356.5 of the Act, reasonable attorneys fees in the amount of $828,834.53 and costs and expenses in the amount of $70,008.41 incurred by Plaintiffs as of June 30, 1996, plus additional attorneys' fees, costs, and expenses incurred and to be incurred by Plaintiffs after that date to be determined by the Court.

d. Additional sums reasonably expended by Plaintiffs to protect their security interests in the Properties.

e. Tax collectors' costs pursuant to Section 53356.2 of the Act.

f. Actual costs of foreclosure and sale.

g. The amounts due and owing under paragraph 7.c. through 7.f. above shall be added to the amount of Plaintiffs' lien against Parcel 1 and Parcel 2 as follows: 34% of each amount shall be added to the amount due and owing and secured by Plaintiffs' lien against Parcel 1 set forth in paragraph 7.a. above and 66% shall be added

to the amount due and owing and secured by Plaintiffs' lien against Parcel 2 set forth in paragraph 7.b. above.

8. The Properties are owned by Oxnard Town Center, a California limited partnership.

9. The Clark/Witmer/Donlon Defendants and Cross-Complainants are beneficiaries of that certain Deed of Trust recorded on December 3, 1986 as Document No. 86-175829 in the Official Records of the Office of the County Recorder of Ventura County, California (the "Clark/Witmer/Donlon Deed of Trust"). The Clark/Witmer/Donlon Deed of Trust was modified by that certain Partial Reconveyance of Deed of Trust recorded on March 7, 1995 as Document No. 95-026282 in the Official Records of the Office of the County Recorder of Ventura County (the "Partial Reconveyance").

10. New Street Capital Corporation, as successor in interest to Drexel Burnham Lambert Incorporated, is the beneficiary under that certain Deed of Trust recorded November 23, 1988 as Document No. 88-178835 in the Official Records of the Office of the County Recorder of Ventura County, California (the "Drexel Deed of Trust").

11. The Bank of A. Levy is beneficiary under that certain Deed of Trust recorded January 25, 1990 as Document 12 No. 90-012350 in the Official Records of the Office of the County Recorder of Ventura County, California (the "Bank of A. Levy Deed of Trust").

12. Executive Life Insurance Company and Executive Realty Corporation no longer claim an interest in the Properties under that certain Deed of Trust recorded January 22, 1988 as Document No. 88-008681 in the Official Records of the Office of the County Recorder of

Ventura County, California (the "Executive Life Deed of Trust"), and the Bank of A. Levy Deed of Trust.

13. Pursuant to California Revenue and Taxation Code § 2192.1, the District's Liens are senior in priority to the Clark/Witmer/Donlon Deed of Trust, the Drexel Deed of Trust, and the Executive Life Deed of Trust, and the Bank of A. Levy Deed of Trust.

14. Pursuant to California Government Code Section 53356.1(c), this Judgment may be modified in the future to include subsequent special taxes which become delinquent after August 31, 1996, together with interest, penalties, and other charges. Interest at the rate of 1.5% per month as set forth in paragraphs 2.a.(1) through (5) and 2.b.(1) through (5) above shall continue from August 31, 1996 until the date of the foreclosure sale(s) ordered herein. Plaintiffs shall submit a noticed motion for modification of the judgment, supported by a declaration of the Financial Analyst for the City of Oxnard, Finance and Management Services Department, acting on behalf of the District, with respect to any subsequent delinquent special taxes, interest, penalties, and other charges. Opposition shall be limited to proof of payment of the special taxes.

15. This Judgment may also be modified in the future to include attorneys' fees, costs, and expenses incurred and to be incurred by Plaintiffs after June 30, 1996 and up to the date of the foreclosure sale(s) hereunder and other charges to be determined by the Court pursuant to relevant statutes and Court rules, upon submission of a motion for attorneys' fees.

16. Plaintiffs are the prevailing party and therefor shall recover from said Clark/Witmer/Donlon Defendants and

Cross-Complainants' costs of suit in the amount of $13,022.27 pursuant to California Code of Civil Procedure Sections 1032 and 1033.5.

17. This Court shall retain jurisdiction to modify the Judgment as set forth above, and otherwise according to law.

18. The Properties described in paragraph 23, or as much of them as may be necessary, will be sold in the manner prescribed by law, and the writs of sale will issue to the Sheriff of Ventura County, ordering and directing him to conduct such sales. Plaintiffs or any other party to this action may purchase at the foreclosure sale or sales.

19. From the proceeds of the sale of each parcel, the Sheriff will pay to Plaintiffs, after deducting costs of Court and the expenses of the levy and sale, the sums adjudged due with respect to each parcel under paragraph 2 above, plus interest at the annual rate of 10% from the date of this Judgment or any Modified Judgment.

20. If any surplus remains after the payments specified in paragraph 2 are made, the surplus will be paid as set forth in California Code of Civil Procedure Sections 703.830 through 701.830.

21. The Oxnard Town Center Defendants, the Clark/Witmer/Donlon Defendants, Drexel Burnham Lambert Incorporated, New Street Capital Corporation, the Bank of A. Levy, Executive Life Insurance Company, and Executive Realty Corporation are not persons against whom a deficiency judgment may be ordered and are not personally liable for payment of the amounts secured by the District's liens set forth in paragraph 7 above or amounts added hereto pursuant to paragraphs 14 or 15

above. Notwithstanding the foregoing, the Clark/Witmer/Donlon Defendants and Cross-Complainants are jointly and severally liable for those costs of suit set forth in paragraph 16 above, and nothing herein is intended to affect personal liability for costs on appeal, if any.

22. On completion of the sale or sales, the Sheriff will execute deed(s) of sale to the purchasers, who may then take possession of the Properties, if necessary, with the assistance of the Sheriff of Ventura County.

23. The Oxnard Town Center Defendants, the Clark/Witmer/Donlon Defendants, Drexel Burnham Lambert Incorporated, New Street Capital Corporation, the Bank of A. Levy, Executive Life Insurance Company, and Executive Realty Corporation and all persons claiming from or under any of them, as lien claimants, judgment creditors, purchasers, encumbrances, or otherwise, all persons and their heirs or personal representatives having liens by judgment or decree on the described real property or any portion thereof or having any claim by or under such judgment or decree, all persons claiming under them, and all persons claiming to have acquired any estate or interest in the premises after the recording of notice of the pendency of this action with the County Recorder are forever barred and foreclosed from all equity of redemption in and claim to the premises, from and after delivery of the deed(s) by the Sheriff.

24. The Properties that are the subject of this judgment of foreclosure and order of sale are more particularly described as follows:

Parcel 1: [legal description omitted here]

Parcel 2: [legal description omitted here]

Dated: SEP 27 1996

s/John J. Hunter
Judge of the Superior Court

SUBMITTED BY:

COX, CASTLE & NICHOLSON, LLP

By: s/Diane Paul
Diane B. Paul
Attorney for Plaintiffs,
THE CITY OF OXNARD and
COMMUNITY FACILITIES
DISTRICT NO. 88-1 OF
THE CITY OF OXNARD
(OXNARD TOWN CENTER)

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

CITY OF OXNARD etc. et.al.,	2d Civil No. BO81684 Super. Ct. No. 125654 (Ventura County
Petitioners,	
v.	
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF VENTURA,	Court of Appeal-Second Dist. FILED NOV 22 1994
Respondent;	JOSEPH A. LANE, Clerk Deputy Clerk
OXNARD TOWN CENTER, etc., et al.,	
Real Parties in Interest.	

Here we hold that petitioner, the City of Oxnard ("City"), may collect delinquent special taxes by judicial foreclosure pursuant to the lien provided for taxes on real property under Revenue and Taxation Code Section 2187 to support the Communities Facilities District No. 88-1 (petitioner, hereafter "District") created pursuant to the Mello-Roos Community Facilities District Act (Gov.

Code, § 53311 et seq. ["the Act"]). Accordingly, we grant petitioners' request for a writ of mandate to compel the trial court to vacate the summary judgment issued in favor of real party in interest, Bank of A. Levy ("Bank"), which holds a second trust deed on the subject property.[1]

FACTS

On June 14, 1988, voters of the District approved the issuance of Mello-Roos bonds for the District. The city council, acting as the legislative body for the District, adopted a resolution of necessity to incur the approved bonded indebtedness therefor. On July 12, 1988, the city council recorded a notice of special tax authorization for this bonded indebtedness after adoption of the resolution pursuant to Streets and Highways Code section 3114.5 and Government Code section 53340.

On August 12, 1988, the trial court entered judgment on a separate action filed by the City, on behalf of the District, to validate the proceedings to establish the District, the assessment of special taxes and the issuance of $14,770,000 of Mello-Roos bonds for the District.

In December 1988, Bank approved a written loan request for $1.6 million for the subject property. That request acknowledged that the property was in the District and was subject to Mello-Roos special taxes. The Bank required part of the loan proceeds to be used to pay the 1988/1989 special taxes for the District. Bank obtained a second trust deed to the subject property as security for the loan.

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[1] The petitioners' request for judicial notice filed June 13, 1994, is denied.

In 1991, the property owner ceased paying taxes on the property. On April 12, 1993, City and District filed a complaint for judicial foreclosure of the special tax lien to collect delinquent special taxes for the 1991-1992 and the 1992-1993 fiscal years, pursuant to the Act. (Gov. Code §§ 53356.1, 53356.2.)[2]

Among other things, the complaint alleged that the "City Council recorded a Notice of Special Tax Authorization" and that there is "[a] continuing lien to secure each levy of special taxes attached to all ... real property in the District ..." The city council authorized the issuance of bonds on behalf of the District"... to be secured by special tax liens on all parcels located within the ... District pursuant to Section 53345 of the Act.... ."

Petitioners prayed, inter alia, "[f]or a judgment ordering that Plaintiffs' lien for special taxes ... be foreclosed ..." They also requested "[t]hat the [trial] Court enter its judgment determining that the rights, claims ... liens ... of the Defendants ... are subject and subordinate to Plaintiffs' special tax lien." District also

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[2] Donlon, holder of the first trust deed on the subject property, has filed a cross-complaint against Oxnard Town Center and others. Neither City nor Bank are parties to the cross-action, and respondent trial court ordered the Donlon cross-action severed and tried separately, after the main action. We grant the request of City and District to permit the cross-action to proceed to trial.

City's complaint and the instant petition named Bank as a claimant asserting a superior interest based on the Bank's second trust deed on the instant property.

sought a determination of the relative priority of the liens.

The parties filed cross-motions for summary judgment on undisputed facts. City claimed that as a matter of law they had a priority lien on the properties and had a right to foreclose immediately. Bank claimed that the City had not perfected its lien, and that the Bank's lien from its second trust deed had priority. In opposition to Bank's motion, City maintained that its special tax lien arose in June 1988, by operation of law pursuant to Revenue and Taxation Code sections 2187 and 2192 and Government Code section 53340.

On February 2, 1994, the trial court filed its order of summary judgment in favor of the Bank. In its order, the trial court found that the Act did not create a lien by operation of law; that "... the Mello-Roos Act, as it existed in 1988, is unclear and ambiguous as to the creation of any special tax lien. A mechanism to create such a lien is simply absent from the statutory scheme. Therefore, the Court finds that there is no lien and that the Bank's lien has preference over any claim of the City." The trial court entered summary judgment on February 2, 1994.

On February 7, 1994, petitioners requested this court to issue a writ of mandate to compel the trial court to vacate its grant of summary judgment to Bank. We granted an alternative writ to consider the matter.

DISCUSSION

Propriety of Consideration of Writ Petition

"A summary judgment entered ... is an appealable judgment as in other cases." (Code Civ. Proc., § 437c, subd. (1).) Nonetheless, "'... when the remedy by appeal

is rendered inadequate in the context of a specific case, this court [of appeal] may, in its discretion, permit an aggrieved party to bypass the appellate process and pursue extraordinary relief. [Citations.]'" (Silva v. Superior Court (1993 14 Cal.App.4th 562, 573-574; accord, City of Glendale v. Superior Court (1993) 18 Cal.App.4th 1768, 1776.)

This is such a case. "'[T]he issues presented are of great public importance and must be resolved promptly' ... [because they concern a matter] of considerable statewide significance." (California Educational Facilities Authority v. Priest (1974) 12 Cal.3d 593, 598, which concerned the constitutionality of issuing and selling certain bonds to finance educational facilities of a college.) We hold that consideration of relief by writ is warranted in this instance.

Res Judicata and Statute of Limitations

Petitioners claim that the doctrine of res judicata and the statute of limitations bar Bank from proceeding. Not so.

"In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" (Bernhard v. Bank of America (1942) 19 Cal.2d 807, 813.)

The instant complaint seeks judicial foreclosure pursuant to a special tax lien. It differs from the previous action. The previous action sought only to validate the

proceedings to establish the District, to approve the assessment of special taxes to support the District and to obtain permission to issue bonds for the District. Bank was neither a party to the validation action nor was it in privity with a party to that action. The doctrine of res judicata is inapplicable here.

Petitioners opine that the statute of limitations set forth in Government Code Section 53341 bars this summary judgment. Section 53341 states, in pertinent part, "[a]ny action or proceeding to attack, review, set aside, void, or annul the levy of a special tax or an increase in a special tax ... shall be commenced within 30 days after the special tax is approved by the voters." (Emphasis added.)

Because the actual levy of special taxes may occur only after adoption of an ordinance pursuant to an election authorizing a district to levy them, "the only logical interpretation which can be given to section 53341 is that the section is directed toward actions which challenge the authority of districts to levy special taxes -- the authority which is bestowed on a district by the voters ... ." (New Davidson Brick Co. v. County of Riverside (1990) 217 Cal.App.3d 1146, 1151, emphasis added.) Therefore, the nature of action to which the limitation of section 53341 applies "is a challenge to the district's authority to subject ... a special tax levy." (Ibid.; see also O'Keef v. Atascadero County Sanitation Dist. (1971) 21 Cal.App.3d 719 [claim of invalidity of bonds on grounds that petitioner had been denied right to protest assessment when matter submitted to voters barred by similar statute]; California Ranch Homes Development Co. v. San Jacinto Unified School Dist. (1993) 17 Cal.App.4th 573, 577 [suit to challenge erroneous rate of school impact fee barred by limitations statute which regards

protests of "imposition of any fees ... ."]; Dawson v. Town of Los Altos Hills (1976) 16 Cal.3d 676, 682 [challenging the existence of an assessment district and thus all its obligations and duties, as an action "contesting the 'validity of an assessment." [Citations.]"].)

The cases cited by City are inapposite because they all concern direct challenges to the validity of the creation of a district or as to the validity of taxes levied therefor. The issue in the instant action, however, is whether a lien on real property in the District was created which enables it to judicially foreclose on the subject property to enforce the collection of delinquent special taxes for the payment of interest on the bonds approved. Because this proceeding does not directly challenge either the validity of the creation of the District or its taxes, the limitations period stated in section 53341 does not apply here.

Standard of Review

"Summary judgment is a drastic measure that deprives the losing party of a trial on the merits. [Citation.]" It should therefore be used with caution, so that it does not become a substitute for trial. (Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092, 1107.) Because a motion for summary judgment raises only questions of law, this court independently reviews all the papers submitted. (Geertz v. Ausonio (1992) 4 Cal.App.4th 1363, 1366.) "Any doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. [Citation.]" (Molko, supra, at p. 1107.)

Liens to Enforce Collection of Delinquent Special Taxes

The parties and amici curiae urge us to consider various dire consequences which thy suggest may ensue from our decision here today. That is not our function. Code of Civil Procedure section 1858 provides that "[i]n the construction of a statute or instrument, the office of the Judge is simply to ascertain ... what is in terms or in substance contained therein, not to insert what has been ommitted, or to omit what has been inserted ... ." We may not weigh the wisdom of the statutes enacted by the Legislature. (Wells Fargo Bank v. Superior Court (1991) 53 Cal.3d 1082, 1099; Delaney v. Superior Court (1990) 50 Cal.3d 785, 804, 805.) Unless we can hold that applicable statutes require a certain result by necessary implication, we must accept the terms of statutes as they are written. (Woodland Joint Unified School District v. Commission on Professional Competence (1992) 2 Cal.App.4th 1429, 1451.)

Our review regards the "peculiarly legislative process" of the taxing power of the sovereign. In general, such review is "quite narrow." (See Dawson v. Town of Los altos Hills, supra, 16 Cal.3d at pp. 683-684.) Section 53315 of the Act states, however, that "[t]his chapter shall be liberally construed in order to effectuate its purposes." "The local agency may take any actions or make any determinations which it determines are necessary or convenient to carry out the purposes of this chapter and which are not otherwise prohibited by law." (Gov. Code, § 53312.5.) The primary purpose of the Act is to provide "... an alternative method of financing certain public capital facilities and services ... ." (Gov. Code, § 53311.5.)

Creation of Instant Lien by Operation of Law

"A lien is created: 1. By contract of the parties;

or, 2. By operation of law." (Civ. Code, § 2881.) There is no allegation that a lien was created by a contract between the parties. If there is a lien to enforce collection of these taxes, it exists by operation of law.

In Boskowitz v. Thompson (1904) 144 Cal. 724, plaintiff owners of land brought an action to enjoin the collection of assessments to pay the interest on irrigation district bonds based on certain irregularities concerning the election which authorized the bonds. Our Supreme Court stated that "[w]hatever lien the bondholders have against the lands within the district exists by virtue of the statute under which the bonds were issued and the assessment levied. The lien does not exist by reason of any equity in their behalf, or spring from any contract between the parties, but is purely a creature of statute.

"The collection of taxes belongs to the executive branch of the government, and can be assumed by the judiciary only under express legislative authority therefor. Courts may inquire into and determine the validity of the assessment or other proceedings, but unless the statute has declared it to be a lien it cannot adjudge it to be one, and if the statute has declared it to be a lien, and provided for its enforcement, its enforcement can be [made] only in the mode provided by the statute." (Boskowitz v. Thompson, supra, 144 Cal. at p. 730.) We construe the applicable statutes in accordance with these rules of construction.

One of City's contentions is that a lien arose by operation of Government Code section 53340. From its amendment in September 1986 until its further amendment, effective January 1, 1989, section 53340 stated, in pertinent part, "[t]he special tax may be collected in the same manner as ordinary ad valorem property taxes are collected and may be subject to the

same penalties and the same procedure, sale, and lien priority in case of delinquency as is provided for ad valorem taxes, ..." (Emphasis added.)

This section authorized the City to collect the instant delinquent special taxes by use of the same procedure, sale and lien priority as is provided for ad valorem taxes, but it did not create any liens per se.

Special taxes are not the same as ad valorem taxes. Article XIIIA, section 4 of the California Constitution states, in pertinent part, that "[c]ities ... and special districts ... may impose special taxes on such district, except ad valorem taxes on real property ... ." (Emphasis added; and see Heckendorn v. City of San Marino (1986) 42 Cal.3d 481, 486.) The lien created by ad valorem taxes does not, ipso facto, create a lien for Mello-Roos facilities districts.

City contends that a lien for these special taxes was created by operation of Revenue and Taxation Code Section 2187. We agree. The Revenue and Taxation Code states: "Every tax on real property is a lien against the property assessed." Revenue and Taxation Code section 104 broadly defines "real property" to include: "(a) The possession of, claim to, ownership of, or right to the possession of land... . [¶] (c) Improvements."

Government Code section 53325.3 states in pertinent part, that "... there is no requirement that [a special tax] be apportioned on the basis of benefit to any property. However, a special tax ... may be on or based on benefit received by parcels of real property, the cost of making facilities or authorized services available to each parcel ... as determined by the legislative body. A special tax apportioned on any of these bases shall not be construed to be on or based upon the ownership of real

property," (Emphasis added; and see City of Huntington Beach v. Superior Court of Orange County (1978) 78 Cal.App.3d 333, 340.)

Here, the special tax election, and the resolution of the City adopted to incur the bonded indebtedness for the District, state that the debt shall be incurred "... to finance the construction ... [of] certain real and other tangible property with an estimated useful life of five years or longer, including storm drains and flood protection, roadway improvements, sewer and water improvements, landscaping and fencing, street lights and utilities, electrical lines, telephone lines, gas lines and temporary freeway access ramps and all equipment and property therefor ... all to fulfill the demand for services resulting from the development of the Oxnard Town Center ... to serve the area within the ... District." (Emphasis added.)

Thus, the instant special taxes pay for the bonded indebtedness to finance infrastructure to serve the District. The rate and method of apportionment of these taxes was incorporated by reference in the notice of special tax authorization. Apportionment is based on square footage and acreage of developed and undeveloped real property respectively, for parcels in the District. Because the tax is not based ont he benefit received or on the cost of making services available to each parcel, and because the tax is apportioned on the basis of square footage, this special tax is based on the ownership of real property in the District, including the instant parcel. Revenue and taxation Code section 2187 applies here.

Government Code section 53326, subdivision (c), also establishes that these special taxes are levied on real property. It requires that the election to authorize the

levy of these taxes be "... by the landowners of the proposed district whose property would be subject to the tax ... ." (Emphasis added.) The Act requires that county auditor to report the amount of special taxes collected "... and from which property those revenues were collected, identifying any properties which are delinquent ... ." (Gov. Code, § 53340.5, emphasis added.)

We hold that the special taxes levied in this case are on real property within the meaning of Revenue and taxation Code section 2187 and thus are a lien on parcels of real property within the District, including the subject one. (See also 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, § 207, p. 261.)

The Bank construes Government Code sections 53340 and 53356.1 to mean that the City had the statutory power to levy and collect special taxes, but no lien to foreclose upon delinquent special taxes until after January 1, 1989. We disagree. The levy of the special tax on the real property in this District created a lien by operation of law. (Rev. & Tax. Code, § 2187.)

Since 1986, Government Code section 53356.1 has permitted the instant action for judicial foreclosure of the lien to collect delinquent special taxes. It states, in pertinent part, "(a) As cumulative remedy, if any amount levied as a special tax for the payment of bond interest or principal ... [is] not paid when due, the legislative body may ... order that the same be collected by an action brought in the superior court to foreclose any lien therefor." (Stats. 1986, ch. 1102, No. 6 Deering Adv. Legis. Service, p. 161.)

Government Code sections 53340 and 53356.1 and

Streets and Highways Code sections 3114.5 and 3115.5 were amended to provide for recordation of a notice of special tax lien to secure the annual levy of these taxes, to be indexed to the names of the property owners within community service districts. These amendments did not eviscerate the lien created by revenue and Taxation Code section 2187.

The California Senate Local Government Committee report concerning these amendments states, in pertinent part, that "[i]n response to complaints from new homebuyers, the Legislature required the community facilities district's legislative body to record a special tax notice soon after formation of the new district (Sen. Bill No. 1115, Mello, 1986). But Mello-Roos special taxes are collected with other property taxes and rely upon the property tax lien to secure its collection. For this reason, title companies are unaware of Mello-Roos special taxes. Some new homebuyers recently complained they were unaware of the special tax ... until after they bought their homes.

"SB 2254 permits the district's legislative body to impose a separate, continuing lien on district property to secure a voter-approved special tax." (Emphasis added.)

The report explains that "SB 2254 tightens the procedures for collecting special taxes and clarifies several ambiguities in the Act. ... The creation of a separate, recorded special tax lien enables title companies to make information on the special taxes easily available to prospective homebuyers." Thus, these amendments add an additional, separate lien to provide better notice to title companies and prospective homebuyers.

The California Supreme Court informs us that

"statutes ... must be given a reasonable and practical construction in accordance with the probable intent of the Legislature. [Citations.]" (County of Nevada v. MacMillen (1974) 11 Cal.3d 662, 672-673.) Statutes will not be interpreted to render absurd results or to defeat the Legislature's central objective. We presume "... the Legislature intended reasonable results consistent with its expressed purpose, not absurd consequences. [Citations.]" (Harris v. Capital Growth Investors XIV, (1991) 52 Cal.3d 1142, 1165-1166; Leslie Salt Co. v. San Francisco Bay Conservation Etc. Com. (1984) 153 Cal.App.3d 605, 614.) Statutes which lack clarity "... will be upheld if [their] terms may be made reasonably certain by reference to other definable sources. [Citations.]" (County of Nevada v. MacMillen, supra, at p. 673.) Those sources may include "'... its legislative history or purpose. [Citations.]'" (Ibid., fn. 9.) Here, the Legislature recognized that the Act lacked clarity and created notice problems for title companies and prospective homebuyers.

Government Code section 53328.5, as amended, simply permitted the City to direct the imposition of a separate lien for these special taxes and to require recording and indexing the documents regarding such taxes after January 1, 1989. This legislation enabled districts to provide better notice to lenders and prospective purchasers of pre-1989 bond obligations, but it did not require the City to do so. (See California computer Products, Inc. v. County of Orange (1980) 107 Cal.App.3d 731, 737 - taxes are to be determined in accord with the law in effect when the right to tax vests.)

Nor did the 1988 amendments alter the right of legislative bodies of community service districts to seek judicial foreclosure of the lien pursuant to former

Government Code sections 53356.1 and 53340. The fact that former section 53340 did not describe the mechanics of the lien procedure does not affect the validity of the lien. (German Sav. Etc. Soc. v. Ramish (1902) 138 Cal. 120, 125 - tax lien valid even though statute provided no explanation about the mechanism of the lien.)

The Bank may not use these remedial statutes as a sword to invalidate this properly-established special tax lien. The Bank knew that the instant property was in a Mello-Roos district. It knew about the tax levy and the bonds before it issued the instant loan, and it required that part of the loan proceeds to be used to pay the 1988/1989 special taxes.

Bank questions whether petitioners have priority on their lien. They do. Revenue and Taxation Code section 2192.1 states, in pertinent part, "[e]very tax declared in this chapter to be a lien on real property ... [has] priority over all other liens on the real property, regardless of the time of their creation. Any tax ... described in the preceding sentence shall be given priority over matters, including, but not limited to, any ... deed ... with respect to which the subject real property may become charged or liable." (Emphasis added.) The trial court's order would be a windfall to the Bank and it is at variance with the Legislature's expressly stated goal of liberally construing the Act to effectuate its purposes.

Accordingly, we grant the petition for a writ of mandate to compel the trial court to vacate its summary judgment in favor of Bank and to enter a new and different judgment denying summary judgment to Bank. The parties are to bear their own costs.

NOT TO BE PUBLISHED.

STONE, P.J.

We concur:

GILBERT, J.

YEGAN, J.

Supreme Court, U.S.
FILED
OCT 1 1998
OFFICE OF THE CLERK

(2)

No. 98-440

In The

Supreme Court of the United States

October Term, 1997

ROGER M. DONLON, et al.,

Petitioners,

v.

CITY OF OXNARD and COMMUNITY FACILITIES DISTRICT NO. 88-1 OF THE CITY OF OXNARD (OXNARD TOWN CENTER),

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second District, Division Six

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.
STATEMENT OF THE CASE

In 1987, the Donlons bought an interest in a recorded deed of trust securing a note for just under $12,000,000. (1 CT 188-192.)[1] The note called for annual payments of just under $2,000,000 for five years with the balance, $8,300,000, then being due. (1 CT 193.) The income from the land was just over $154,000 a year. (Petition for rehearing in the Court of Appeal at 2-3.) However, the Donlons were willing to buy the note because the owners of the land had plans for a substantial project which called for "converting the [land] from its then use as agricultural property to retail, commercial, residential and industrial uses." (SCT 189.)

In 1988, the City of Oxnard formed Community Facilities District No. 88-1 of the City of Oxnard (Oxnard Town Center) (the "District") under the Mello-Roos Community Facilities Act of 1982, California Government Code §§ 53311, *et seq.*, to finance the construction of streets, highways and other infrastructure which would support the development of the land. (1 CT 12.) In order to do this, the District was authorized to, and did, sell almost $15,000,000 in bonds which were to be repaid through the levy and collection of special taxes. (*Id.*)

The project did not go forward because of adverse economic conditions. The owner of the project stopped paying the special taxes in 1991. (1 CT 14.) In 1993, the District and the City sued to judicially foreclose the lien

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[1] "CT" means the Clerk's Transcript on appeal and "SCT" the Supplemental Clerk's Transcript.

provided by California law to secure the payment of the special taxes. (1 CT 1.) At the time the judgment was entered in 1996, the unpaid special taxes were in excess of $12,000,000 with interest mounting at the rate of 1.5% per month. (Appendix C to the Petition at 8c-10c.)

The Court of Appeal's decision affirming the trial court's judgment made it clear that California law gives the lien securing the special taxes a super priority (Appendix A to the Petition at 20a-22a) which means that the Donlons' deed of trust – the security for their note – will be wiped out when the lien securing the special taxes is foreclosed.

II.

THE REASONS WHY THE COURT SHOULD DENY THE DONLONS' PETITION FOR WRIT OF CERTIORARI

The questions presented by the Donlons fall into two categories. The first has to do with the validity of the process by which California law allows the adoption of special taxes and the priority that it accords to the lien securing their repayment. The second has to do with the validity of unpublished appellate opinions.

The Donlons are, of course, unhappy that their investment, made in the heady days of 1987, has ended up as yet another victim of the California real estate depression of the 1990's. Throughout the foreclosure proceedings, the Donlons have made every argument – constitutional, statutory and *ad hominem* – to save themselves from what turned out to be a bad investment decision.

However, the Donlons' unhappiness at having made a bad investment decision in 1987 is no reason why the Court should grant their petition in 1998 because neither of the criteria set forth in Rule 10 for granting a petition for a writ of certiorari to review a decision of a state court has been met. The Donlons have not cited a single case which shows that the California Court of Appeal's opinion conflicts with the decision of any other court; that it presents an important, but unsettled, question of federal law; or that it conflicts with relevant decisions of this Court.

III.

ARGUMENT

A. Taxing Districts Are Typically Formed Without The Involvement Of Lienholders

The situation in the case at bar has arisen repeatedly in the context of special assessment districts. In each case, the lienholder has recorded his or her lien, a special assessment district has been formed without notice being given to the lienholder, an assessment secured by a lien which has priority over private liens has been imposed, the landowner has failed to pay the assessment, and the holder of the previously recorded lien has attacked the priority of the assessment lien on the ground that due process was denied because he or she was not given notice of the formation of the district. In every case,

federal and state, the lienholder has lost.[2] *See, e.g., Zipperer v. City of Fort Meyers*, 41 F.3d 619 (11th Cir. 1995), *Federal Deposit Insurance Corp. v. City of New Iberia*, 924 F.2d 610 (5th Cir. 1991), *Holmes v. Bowen*, 60 Ohio. App. 168, 19 N.E.2d 974 (1938), *City of Birmingham v. Smyer*, 230 Ala. 234, 160 So. 764 (1935), *Mortgage Company v. Lory*, 109 W. Va. 310, 154 S.E. 136 (1930), *Leitch v. City of Dublin*, 160 Ga. 691, 128 S.E. 889 (1925), *Drainage Commissioners v. East Carolina Home & Farm Association*, 165 N.C. 697, 81 S.E. 947 (1914), *Fitchpatrick v. Botheras*, 150 Iowa 376, 130 N.W. 163 (1911), *City of Richmond v. Williams*, 102 Va. 733, 47 S.E. 844 (1904), and *German Savings & Loan Society v. Ramish*, 138 Cal. 120, 69 P. 89 (1902).

The Donlons have not cited a single case to the contrary.[3]

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[2] The Donlons spend much of their Petition arguing that the Court of Appeal misunderstood and misapplied California statutory and case law. (Petition at 9-19.) "These are matters of state law and not our concern." *Radio Station WOW v. Johnson*, 326 U.S. 120, 129 (1945). This follows from the Court's fundamental principle that it is not free to substitute its interpretation of state law for those of a state court. *Schad v. Arizona*, 501 U.S. 624, 636 (1991).

[3] None of the federal cases cited by the Donlons deal with facts which are even close to those presented by the case at bar. As such, they provide no support for the Donlons' position. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

B. There Is Nothing Unconstitutional About Giving A Governmental Lien Priority Over A Previously Recorded Private Lien

This Court held over 100 years ago that government could constitutionally give a governmental lien priority over a previously recorded private lien. *Provident Institution for Savings v. Mayor and Aldermen of Jersey City,* 113 U.S. 506 (1885).

The Donlons have not cited a single case to the contrary.

C. Unpublished Opinions Are Frequently Used By An Overworked Judiciary

The California Constitution, Article VI, § 14, requires that every decision of a California appellate court be in writing with reasons stated. There is no corresponding federal constitutional requirement and case law has made it clear that the use of unpublished summary decisions pass constitutional muster.

> "Petitioner's other complaints about the Oklahoma court's issuance of a summary opinion in his direct appeal are similarly unavailing. First, as we have said before, there is nothing inherently objectionable in the Oklahoma court's use of summary opinions in unpublished cases." *King v. Champion,* 55 F.3d 522, 526 (10th Cir. 1995).

Several federal Circuit Courts of Appeal have cited this Court's statement in *Taylor v. McKeithen,* 407 U.S. 191, 194 n.4 (1972), which agreed that the Courts of Appeals "should have wide latitude in their decisions of whether

or how to write opinions." *See, e.g., Furman v. United States*, 720 F.2d 263, 264-265 (2d Cir. 1983), and *United States v. Baynes*, 548 F.2d 481 (3d Cir. 1977).

In fact, every one of the federal Circuits has adopted local rules which provide for the designation of opinions as applying only to the litigants involved, having no precedential value, with many of the local rules expressly prohibiting the publication of these opinions. First Circuit Rule 36.2; Second Circuit Rule § 0.23; Third Circuit Internal Operating Procedure, Ch. 6; Fourth Circuit Rules 36(a)-(c); Fifth Circuit Rule 47.5; Sixth Circuit Rule 24; Seventh Circuit Rule 53; Eighth Circuit Rule 28A(k) and Internal Operating Procedures, App. I; Ninth Circuit Rules 36-1-3; Tenth Circuit Rules 36.1-.3; Eleventh Circuit Rules 36-1-3; District of Columbia Circuit Rule 36; and Federal Circuit Rules 36 and 47.6.

All of the rules cited above make it clear that, while an unpublished opinion may not be cited as precedent, it nevertheless invokes the doctrines of res judicata, law of the case and collateral estoppel.[4] Thus, all litigants – the ones most involved in any case – receive all of the protection that the judicial process provides whether or not an opinion is published.

The Donlons have not cited a single case to the contrary.

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[4] This is the rule in California. *See* Rule 977(b)(1) of the California Rules of Court, quoted in the Petition at 24.

IV.

CONCLUSION

The City and the District contend that the Donlons' petition for writ of certiorari should be denied.

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No. 98-440

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

Roger M. Donlon et al., *Petitioners*

v.

City of Oxnard et al., *Respondents*

On Petition For a Writ of Certiorari
To The Court of Appeal of
the State of California
Second Appellate District, Division Six

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
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v.

City of Oxnard et al., *Respondents*

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Donlons respectfully reply to the Brief filed in this case by the City of Oxnard (City) in Opposition to the Donlons' Petition for a Writ of Certiorari.

A. The City's Statement of the Case misstated material facts.

The City's abbreviated "Statement of the Case" asserts that the City formed the District

> "to finance the construction of streets, highways and other infrastructure which would support the development of the land."

City's Brief in Opposition to the Donlons' Petition for Writ of Certiorari (City's Brief) at p. 1.

Then, the City asserts

> "[t]he project did not go forward because of adverse economic conditions."

City's Brief at p. 1.

These assertions are materially false and misleading.

The unvarnished truth is that at the sole behest of the Donlons' debtor (Developer) the City formed the District to provide the Developer with tax-free bond financing to be used exclusively for a "project" which only involved the private improvement, and private (for profit) sale of property which is NOT subject to this foreclosure action (Commercial Land). CT 1817.[1] That "project" (the development and sale of the Commercial Land) went forward as planned. The so called *special tax* of **$32,471,000** at issue here was imposed on different property (Farm Land). The City (and Donlons' debtor) purportedly obligated the Farm Land (which is the sole property subject to this foreclosure action) to pay for over 86% of the cost of the bonds the District issued to finance the private development and private (for profit) sale of the Commercial Land. CT 1818. At all relevant times, the Farm Land was separate and apart from the Commercial Land. CT 1816. The Farm Land received no benefit from the tax-free bond financing the City used to finance the Developer's private development and private (for profit sale) of the Commercial Land. CT 264, 1182, 2482, 1863.

The Donlons were never involved in the "project" (the private development and private sale of the Commercial Land for private profit) which the City financed with the tax-free bonds. All the Donlons ever held was an interest in a promissory note secured by a first deed of trust duly recorded against the Farm Land. CT 9-10; 2779; 2786.

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[1]CT refers to the clerk's transcript.

The Donlons' complete loss of their lien against the Farm Land was not occasioned by a "bad investment." Quite to the contrary, it was solely caused by a State court judgment which wiped out the Donlons' lien to pay the delinquent portion of the *special tax* the City imposed on the Farm Land to pay the tax-free bondholders for money freely lent to the Developer (and laundered through the City) with full knowledge of the Donlons' previously recorded lien against the Farm Land.

In sum, the real estate market had nothing to do with the Donlons' loss of their security. Absent the State court judgment at issue here, when the Donlons' note was not paid as agreed, the Donlons would have quickly and easily acquired the underlying security (free and clear fee title to the 181 acres of Farm Land) by non-judicial foreclosure of that security.

B. The Donlons' federal grounds for relief were adequately stated.

Article I, § 10 to the United States Constitution (Contract Clause) prevents a State from pursuing even its legitimate policies of health, safety, **and taxation** with "studied indifference" to the Contract Clause. *See, e.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *Van Hoffman v. City of Quincy*, 71 U.S. (4 Wall) 535 (1866); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

Where, as here, a State law substantially impairs an existing contract, to pass constitutional muster the State must demonstrate a significant and legitimate public purpose behind that law such as remedying a broad and general social or economic problem AND narrowly draw its law to effect that purpose. *Energy Reserves Group,*

Inc. v. Kansas City Light & Power Co. (1983) 459 U.S. 400, 412-413. This so called "strict scrutiny" test is commonly thought of as this Court's doctrinal shorthand for saying a State law which impairs existing contracts or the means of enforcing them is per se unconstitutional.

Frankly, it is hard to imagine a case which involves a more clear and certain violation of the Contract Clause; yet the City asserts

> "the Donlons' unhappiness at having made a bad investment decision in 1987 is no reason why the Court should grant their petition in 1998 because neither of the criteria set forth in Rule 10 for granting a petition for a writ of certiorari to review a decision of a state court has been met."

City's Brief at p. 3.

If this assertion is correct, the Contract Clause, and the decisions of this Court involving it, provide creditors in State court proceedings with no more protection than a can opener.

C. This Case is not governed by "special assessment" cases.

The City asserts "[t]he situation in the case at bar has arisen repeatedly in the context of special assessment districts." City's Brief at p. 3.

This assertion is both legally and factually impossible. By definition, "special assessments" are not taxes. They are charges imposed on specially benefitted property for a benefit specially conferred on that property. *See, e.g.,*

Knox v. City of Orland (1992) 4 Cal.4th 132, 141-142. While it may be true that the holder of a lien against property subject to a special assessment may not be entitled to notice of the special assessment proceeding because (by definition) the lien imposed to pay the special assessment cannot exceed the additional value conferred on the specially assessed property (and therefore cannot adversely affect the lienholders' security interest in that property); these special assessment "principles" have no application to the case at bar.

The question presented here is whether the City could constitutionally impose a **$32,471,000** "*special tax*" on the Farm Land without notice to the lienholders where that *special tax* did not confer any benefit on the Farm Land and that *special tax* **only required the lienholders' debtor to vote for it** AND that *special tax* destroyed the lienholders' security. That question has been finally settled in the Donlons' favor by both *Horn v. County of Ventura* (1979) 24 Cal.3d 605 and *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983). The City's citation to cases which apply only to "special assessments" are, at best, clearly inappropriate, both legally and factually. See the City's Brief at p. 4.

D. State court unpublished opinions are unconstitutional.

Before the Civil War, the United States Constitution's impact on the States was limited to the Contract Clause and a few other provisions not relevant here. Following the Confederate defeat, Congress moved swiftly to extend basic liberties to the citizens of every State. It adopted three new Amendments, starting with the Thirteenth Amendment (1865) which outlawed slavery in every State and culminating with the Fifteenth Amendment (1869)

which guaranteed blacks and former slaves the right to vote in Federal and State elections. In the center stands the Fourteenth Amendment, ratified in 1868, which provides (with emphasis added) that:

> **"[n]o State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of** life, liberty, or **property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"**

United States Constitution, Fourteenth Amendment.

Two concepts are firmly rooted in the Fourteenth Amendment. First, its noble promise of "equal protection of the laws" only applies to the States. Second, that promise was made and the Fourteenth Amendment was adopted because the States could not be trusted to voluntarily keep their constitutional obligations.

In support of its position that unpublished opinions in State proceedings pass constitutional muster the City only cited federal cases dealing with federal decisions. See the authorities cited in the City's Brief at pp. 5-6. These cases are clearly inappropriate. The Fourteenth Amendment has no application to the federal government or the cases decided by its courts. Also, unlike the federal cases City cited, California does have a law which requires its appellate courts to decide each and every case by written opinion with reasons stated. California Constitution, Article VI, § 14.

The City also argues that the California law on

unpublished appellate court opinions satisfies the Fourteenth Amendment's equal protection guarantee because "the doctrines of res judicata, law of the case, and collateral estoppel" apply to these unpublished opinions. See the City's Brief at p. 6.

This argument conveniently disregards the point. The Fourteenth Amendment demands far more than the uniform application of "the doctrines of res judicata, law of the case, and collateral estoppel." At a bare minimum it mandates that

> "[no] State [shall] deprive any person of life, liberty or property without due process of law; **nor deny to any person within its jurisdiction equal protection of the laws**"

United States Constitution, Fourteenth Amendment; emphasis added.

Not only has this Court never addressed the question of whether a State judiciary has the constitutional power to withhold the final outcome of a case or controversy decided by a State appellate court in a written opinion "with reasons stated" from public view; it is hard to see how judicial secrecy promotes judicial economy or otherwise reduces the burdens placed on an "overworked judiciary" as the City alleges. See the City's Brief at p. 5.

In California over 90% of the opinions issued by its appellate courts are unpublished. For what purpose? Why are virtually all the trial courts, appellate courts, and attorneys deprived of the wisdom of these decisions? Why do over 90% of the opinions issued by a California appellate court only uniquely and specially apply to the

litigants before that court? Why are both the California legislature and the people of that great state routinely denied the right to know how California's appellate courts are applying the law? How can withholding the results of a California appellate court decision from public view promote judicial efficiency, reduce the cost or uncertainty of litigation or lighten the judicial workload? Isn't it virtually certain that the publication of all State appellate court decisions would bring clarity and certainty to the law as well as greatly reduce the burdens now imposed on the courts and those who appear before them?

More important to the case at bar; how can the City maintain (or this Court hold) that the Fourteenth Amendment's promise of "equal protection of the laws" is satisfied where over 90% of California's appellate court decisions are uniquely and specially crafted to apply only to the litigants in a particular proceeding (especially in this case where the unpublished State court opinion directly contradicts all prior published precedent)?

This case calls for facing uncomfortable truths: unpublished opinions are too easily manufactured; they undermine the integrity of our entire justice system; they foster naked, unrestrained judicial power; they assist in the creation and destruction of laws approaching tyranny; they invite State courts charged with the solemn responsibility of protecting constitutional rights to destroy those rights; they undermine the public's confidence in the judicial system; they ostracize all but a few from the law; they make a mockery of our most cherished concept that the United States is a nation "indivisible -- with liberty and justice for all."

It is time this Court forced the State courts out of the shadow of unpublished opinions and made them march forthrightly into the bright sunshine of public review.

Publication of all State appellate court opinions is not only a small price to pay to fulfill the United States Constitution's promise of "equal protection of the laws;" it is the minimum price the Fourteenth Amendment commands of State courts.

CONCLUSION

No matter how hard one tries, quicksilver inevitably escapes the grasp. It somehow slithers past the fingers or escapes through some other tiny crevice only to run up the arm or over the back of the hand or past the fingers to wherever it pleases. It simply cannot be confined without a vessel.

Like quicksilver, unpublished opinions in State court proceedings can (and often do) find a path of their own. Freed from public view, the law of the land often yields to passion, greed or corruption; the noble promise of "justice for all" frequently surrenders to a State judiciary which can (and often does) twist and distort the law into whatever form it pleases whenever it pleases for whatever purpose it then craves to achieve.

Time and again this Court has used the constitutional promise of "due process of law" and "equal protection of the laws" to stamp out discrimination in every public place save one: State appellate courts.

In today's climate, the lurking problems of State unpublished opinions cannot be brushed aside. As this case clearly demonstrates, a State appellate court's unbridled ability to publish or not publish its decisions can, and often does, form an impenetrable barrier that works not only to shield otherwise invidious discrimination; but to deprive the litigants of their most sacredly guaranteed constitutional rights.

In this case we are not only talking about principles of equality enshrined in the Fourteenth Amendment and equally applicable to all branches of a State government, we are talking about the very essence of our constitutional form of government. State court opinions which are not published work in all kinds of covert and subtle ways to destroy that government. The effect is corrosive and unjustified. The success of our judicial system rests not so much on the ability of its courts to routinely reach the correct decision; but on the public's faith in the integrity of the judicial system itself. Only the most naive would place their faith and trust in a State judicial system which secretes over 90% of its appellate court decisions from public view when public access is now, more than ever, so easy, painless, and inexpensive.

In short, State court unpublished opinions are the antithesis of our constitutional form of government. In their wake they leave a stench which permeates the entire judicial system.

Now is the time to put a stop to State court unpublished opinions. The Donlons and all other Americans have the constitutional right to have their case judged and decided by a State court in a published opinion issued in compliance with published precedent.

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